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No.

In the

Supreme Court of the United States

October Term, 1998

JACK M. HAEFLING,

Petitioner,

v

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Family & Medical Leave Act of 1993 ("FMLA") was designed to be the least litigious method of implementing a national employment leave policy. The most fundamental dispute-resolution provision of the FMLA is the requirement that employers request medical verification of the leave after the employee provides sufficient notice of such leave. This vital provision was meant to resolve the issue of whether the leave was medically necessary at the time of the leave request, instead of deferring this issue until later in litigation.

In this case a national employer who received sufficient notice repeatedly failed to ask for any medical verification, yet fired the employee for such leave. Thus, the question presented is:

> whether this employer who repeatedly failed to perform its statutory duty to ask for medical verification, yet fired the employee for such leave, may then wait until formal litigation to evade liability under the FMLA by placing the burden of proof on the employee as to the medical necessity of such leave?

This question focuses upon the practical and legal consequences for an employer who fails to perform its statutory duty of requesting medical verification; that is, whether it really matters when an employer fails to ask the employee for medical verification at the time of the leave.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES. iv

OPINIONS BELOW 1

JURISDICTION. 1

STATUTES, RULES & REGULATIONS INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE WRIT 4

A. The Seventh Circuit's Rule Conflicts with the Decisions of All the Other Courts of Appeal That Have Addressed the Issue. 5

1.Other Circuits Hold That After Employee Adequately Notifies Employer of Need for Leave, Then Burden Shifts to Employer. 6

2.Mr. Haefling Gave Adequate Notice to UPS of His Need for Leave. 9

B.The Seventh Circuit's Decision is Not Necessary to Protect Employers from Unscrupulous Use of the Family and Medical Leave Act. 14

C.The Seventh Circuit's Decision Defeats the Purpose of the Family and Medical Leave Act. 15

D.The Seventh Circuit's Decision in the Case Below Conflicts with the Decisions of Several Panels of the Seventh Circuit. 16

E.The Seventh Circuit's Rule Conflicts with Numerous District Court Decisions. 17

CONCLUSION 21

APPENDICES

Jack M. Haefling v. United Parcel Service, Inc., 169 F.3d 494 (7th Cir. 1999) (Opinion) 1a

Jack M. Haefling v. United Parcel Service, cite unreported District Court opinion in Bluebook form (Opinion granting summary judgment) 15a

Statutes, rules and regulations involved in this petition (constitutional provisions, treaties, statutes, ordinances, and regulations not set out in the "Statutes, Rules & Regulations Involved" section below because of length) 43a

Johnson v. Primerica, 1996 WL 34148 at *5 (S.D.N.Y. Jan. 30, 1996) 52a

Pertinent portions of Appendix to Brief of Plaintiff/Appellant before the Seventh Circuit 70a

Pertinent portions of Appendix to Brief of Plaintiff/Appellant before the Seventh Circuit Not Appended to Petition but Lodged 75a

TABLE OF AUTHORITIES

Page

Cases

Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028, 1038 (M.D. Tenn. 1995) 18, 20

Bryant v. Delbar Products, Inc., 18 F. Supp.2d 799, 806 (M.D. Tenn. 1998) 18

D'Alia v. Allied-Signal Corp., 614 A.2d 1355, 1359 (N.J. Ct. App. 1992) 13

Gay v. Gilman Paper Co., 125 F.3d 1432, 1436 (11th Cir. 1997) 5, 7, 9

Haefling v. United Parcel Service, Inc., 169 F.3d 494, 500 (7th Cir. 1999) 4

Hammon v. DHL Airways, Inc., 165 F.3d 441 (6th Cir. 1999) 5, 8, 9, 10

Hendry v. GTE North, Inc., 896 F. Supp. 816, 828 (N.D. Ind. 1995) 18

Johnson v. Primerica, 1996 WL 34148 at *5 (S.D.N.Y. Jan. 30, 1996) 6

Johnson v. Primerica, 1996 WL 34148 at *5 (S.D.N.Y. Jan. 30, 1996) 18

Manuel v. Westlake Polymers Corp., 66 F.3d 758, 764 (5th Cir. 1995) 5, 6, 13, 15, 16

Mora v. Chem-Tronics, Inc., 16 F. Supp.2d 1192, 1209 (S.D. Cal, 1998) 17, 18, 20

O'Hara v. Mr. Vernon Bd. Of Educ., 16 F. Supp.2d 868, 890 (S.D. Ohio 1998) 17

Price v. City of Fort Wayne, 117 F.3d 1022, 1026 (7th Cir. 1997) 16, 17

Satterfield v. Wal-Mart Stores, Inc., 135 F.3d 973, 975 (5th Cir. 1998) 5, 9, 14

Stoops v. One Call Communications, Inc., 141 F.3d 309, 312 (7th Cir. 1998) 16

Stubl v. T.A. Systems, Inc., 984 F. Supp. 1075, 1086 (E.D. Mich. 1997) 12, 18, 20

Uema v. Nippon Express Hawaii, Inc., 26 F. Supp.2d 1241, 1247 (D. Haw. 1998) 17

Vargo Adams v. U.S. Postal Service, 992 F. Supp. 939, 943 (N.D. Ohio 1998) 17

Other Authorities

S. Rep. No. 103-3, at 29 (1993) 12

Rules and Regulations

29 C.F.R. § 303 14

29 C.F.R. § 825.101(b) 14

29 C.F.R. § 825.208(a) (1995) 10

29 C.F.R. §825.301(f)(1995) 19

29 C.F.R. § 825.302(c) 19

29 C.F.R. § 825.303(a) 9

29 C.F.R. §825.303(b) 9, 16

Statutes

29 U.S.C. § 2601 et seq 1

29 U.S.C. § 2601(b)(1) and (2) 15

29 U.S.C. § 2601(b)(3) 14

29 U.S.C. § 2612(a)(1) 8, 10

29 U.S.C.§ 2612(a)(1)(D) 10

29 U.S.C. § 2612(e)(2)(B) 9
29 U.S.C. § 2613 1
29 U.S.C. § 2613(c) 15
9 U.S.C. § 2613(d) 15

Jack M. Haefling respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (1a-14a) is reported at 169 F.3d 494. The opinion of the district court (15a-42a) was not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit (1a-14a) was entered on March 4, 1999. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES, RULES AND REGULATIONS INVOLVED

The text of 29 U.S.C. § 2613 of the Family and Medical Leave Act of 1993 and all other relevant statutory and regulatory materials are reproduced verbatim in the appendix, (44a-51a).

STATEMENT OF THE CASE

This case involves the burden of proof under the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 et seq. ("FMLA"). Specifically, this case involves the burden of proof pursuant to 29 U.S.C. § 2613, a fundamental provision for the least litigious national implementation of the FMLA.

STATEMENT

The unique burden of verification is vital to the least litigious national implementation of the FMLA, which is being used by employees and employers thousands of times daily across the country. The courts below both incorrectly put the burden of verification on the employee, even though it was unquestioned that the employee repeatedly provided sufficient notice and the employer repeatedly failed to ask this employee for any medical verification at the time of the medically necessary leave. Because of this statutory failure by the employer, the employee was unfortunately fired from his nearly 23-year career for absences that he thought were surely protected by the FMLA.

The Seventh Circuit allowed the employer to evade liability, however, by waiting until formal litigation to dispute the medical necessity of the leave under the FMLA and placing the burden of verification on the employee. The Seventh Circuit treated the burden of proof as if the case invoked the burden of proof standard in a Title VII discrimination case, not a case based upon federal legislation that is meant to limit litigation by determining the medical necessity of the leave at the time of the leave-request instead of years later in litigation. In effect, the employer was rewarded for its failure to abide by its statutory duty to request medical verification of the medical necessity of the leave under the FMLA. If the employer had abided by its statutory duty, the issue would not even had been litigated because - by design of the FMLA - it would have been resolved at the time of the medically necessary leave.

The folly of the Seventh Circuit's opinion is fully laid bare when it is considered that an employee absolutely would

not receive protection under the FMLA for his absences if he would fail to properly respond to employer requests for medical certification at the time of the medically necessary leave. Yet when the employer repeatedly fails to abide by its duty to ask for any medical verification at the time of the leave request, the employer is rewarded.

This ruling by the Seventh Circuit throws this law governing the medical leave of millions of employees nationally into disarray. It bolsters an employer's incentive to wait until formal litigation to resolve the issue of medical necessity. By design of the FMLA, this issue was supposed to be determined outside of formal litigation and - at the best time to resolve the issue - at the time of the medically necessary leave. In this area of law that is currently being fully implemented into the daily lives of work-a-day Americans, the Seventh Circuit decision destroys their hopes of any assurance that their medically necessary absences are protected under the FMLA. Instead, now an employer is allowed to fire the employee for taking such medically necessary leave and then later in formal litigation place the burden of proof on the employee.

The result is that the least litigious method of implementing the FMLA will be lost, unless this Court intervenes. This Court has not addressed the FMLA since its enactment in 1993.

On March 15, 1995, Petitioner Jack M. Haefling brought this suit in the United States District Court for the Southern District of Indiana, Indianapolis Division, claiming that his termination of employment from United Parcel Service ("UPS") violated the FMLA. The district court had jurisdiction founded upon 28 U.S.C. § 1331. On December 31,

1996, the district court entered summary judgment against Mr. Haefling.

Mr. Haefling timely filed an appeal with the United States Court of Appeals for the Seventh Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291. On March 4, 1999, the Seventh Circuit affirmed the judgment of the district court. *Haefling v. United Parcel Service, Inc.*, 169 F.3d 494, 500 (7th Cir. 1999). Contrary to the FMLA, even though UPS failed to request medical verification, the court concluded that it was Mr. Haefling's burden to come forward with evidence that he suffered from a "serious health condition" as defined by the FMLA. *Id.* at 501. The court then concluded that Mr. Haefling failed to meet the burdens which the court placed upon him and affirmed the district court's grant of summary judgment in favor of UPS.

It is respectfully submitted that the Seventh Circuit's opinion is in conflict with every other circuit in placing the burden upon a plaintiff to come forward with evidence that his serious health condition qualifies him for FMLA protection when the employer fails to request any medical verification following proper notice. Indeed, all the other circuits addressing this issue have held that it is the employer's responsibility to determine if an employee qualifies for FMLA protection and to seek medical certification if the situation is in doubt. Thus, supervision of this Court is necessary in order to promote uniformity and to clarify the conflict in the circuits.

REASONS FOR GRANTING THE PETITION

There is a square conflict among the courts of appeals regarding the question presented. That conflict is starkly

illuminated by the contrast between the Sixth Circuit's decision in *Hammon v. DHL Airways, Inc.*, 165 F.3d 441 (6th Cir. 1999), and the decision below. Both cases involve the duties of an employee to adequately notify his employer of his need to take medical leave from his employment and the employer's resultant duties under the FMLA. The Sixth Circuit concluded that onc an employer is given notice that an employee is requesting leave for a FMLA-qualifying reason, the employer bears the burden to request any additional information it may need to determine if the employee qualifies for FMLA protection. *Hammon*, 165 F.3d at 450. Conversely, the Seventh Circuit, in the case below, concluded that the burden is upon the employee to prove that he is entitled to FMLA protection, even though the employer repeatedly failed to abide by its statutory duty to request medical verification of the medical necessity of such leave at the time. This sharply different treatment of similarly-situated litigants creates an intolerable conflict--and severe unfairness--that this Court should resolve.

A. The Seventh Circuit's Rule Conflicts with the Decisions of All the Other Courts of Appeal That Have Addressed the Issue.

Like the Sixth Circuit, the Fifth and Eleventh Circuits have held that once an employee has given adequate notice of a request for leave for a FMLA-qualifying reason, the burden shifts to the employer to request any additional information it may need to determine if the reason for the leave qualifies the leave for FMLA protection. *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 975 (5th Cir. 1998); *Manuel v. Westlake Polymers Corp.*, 66 F.3d 758, 764 (5th Cir. 1995); *Gay v. Gilman Paper Co.*, 125 F.3d 1432, 1436 (11th Cir. 1997).

1. Other Circuits Hold That After Employee Adequately Notifies Employer of Need for Leave, Then Burden Shifts to Employer.

In *Satterfield*, the court considered whether the information Satterfield provided her employer, Wal-Mart, sufficiently afforded Wal-Mart the opportunity to assess whether Satterfield's absences were predicated on a "serious health condition," and for that purpose, effectively placing upon Wal-Mart the duty/obligation to request supporting medical documentation. The only information Satterfield imparted to Wal-Mart was a note delivered to Wal-Mart by Satterfield's mother advising that Satterfield "was having a lot of pain in her side," and would not be able to work that day, and her mother's statement that Satterfield was "sick". *Satterfield*, 135 F.3d at 980. The court concluded that this information was not sufficient to reasonably apprise Wal-Mart of Satterfield's request to take time off for a serious health condition within the meaning of the FMLA. *Id.* Therefore, the court held that Satterfield did not give Wal-Mart sufficient information to implicate Wal-Mart's duty to inquire further of Satterfield to determine whether Satterfield's leave qualified for FMLA protection. *Id.* at 980-81. In support of this underlying burden-shifting requirement, the court concluded that "[w]hile an employer's *duty to inquire* may be predicated on statements made by the employee, the employer is not required to be clairvoyant." *Id.* at 980 (Emphasis added) (quoting *Johnson v. Primerica*, 1996 WL 34148 at *5 (S.D.N.Y. Jan. 30, 1996).

Similarly, in *Manuel v. Westlake Polymers Corp.*, the Fifth Circuit discussed the notification requirements under the FMLA and an employer's statutory verification duties after adequate notice. 66 F.3d 758 (5th Cir. 1995). The court

stated that whether notice is adequate under the FMLA is a fact-sensitive inquiry, and the critical question is whether the information given to the employer is sufficient to reasonably apprise the employer of the employee's request to take time off for a "serious health condition". *Manuel*, 66 F.3d at 764. The court did not address whether the plaintiff in that case had given her employer such notice, but remanded the case to the district court to determine if the notice given by the plaintiff was sufficient under the FMLA. However, the Fifth Circuit made it clear that an employee is not expected to be "conversant with the legal intricacies of the Act," but is merely expected to provide adequate notice to implicate his or her employer's statutory duty to inquire further of the employee. *Id.* at 764.

Like the Fifth Circuit, the Eleventh Circuit's decision in *Gay v. Gilman Paper Co.* clearly places the burden of verification on an employer once it has received adequate notice from an employee that he or she is requesting leave for an FMLA-qualifying reason. 125 F.3d 1432, 1436 (11th Cir. 1997). In *Gay*, the plaintiff was hospitalized for a nervous breakdown. Gay's husband notified Gay's employer that she would be absent from work for medical reasons, but intentionally withheld from the employer information regarding the true nature of Gay's condition. Specifically, Gay's husband informed her supervisor that Gay was having "some tests run" and refused to give the supervisor any further information regarding Gay's condition when asked for specifics. Additionally, Gay's husband instructed his sons to withhold information regarding Gay if questioned by her employer. The court held, under these circumstances, "the *burden* to request further information never shifted to [the employer] because [the employer] could not reasonably be expected to

conclude that Gay's absence might have qualified for treatment under the FMLA." *Id.* (Emphasis added.)

As discussed above, the Sixth Circuit clearly addressed the question presented in *Hammon v. DHL Airways, Inc.* and reached a starkly different conclusion from the Seventh Circuit in the case below. 165 F.3d 441 (6th Cir. 1999). In *Hammon*, the court held that once an employer is given notice that an employee is requesting leave for an FMLA-qualifying reason, the employer bears the statutory obligation to collect any additional information necessary to determine if the leave complies with the requirements of the FMLA. 165 F.3d at 450. The court stated that an employee gives his employer sufficient notice that he is requesting leave for an FMLA-qualifying condition when he gives the employer enough information for the employer to reasonably conclude that an event described in 29 U.S.C. § 2612(a)(1) has occurred. *Id.* at 451. The plaintiff in *Hammond*, a pilot employed by DHL Airlines, experienced anxiety during flight training and submitted his resignation. After his resignation, the plaintiff saw a physician regarding his feelings of anxiety. The physician determined that the plaintiff was too anxious to fly, but that he might recover with proper treatment. The plaintiff then called the airline to discuss his condition. The plaintiff's former supervisor told the plaintiff that since he had already resigned, his condition was immaterial to the airline. The Sixth Circuit in *Hammond* found that the plaintiff failed to show he requested leave under the FMLA to address his nervous condition prior to his resignation. *Id.* Specifically, the court held that, since the plaintiff did not tell his employer about his medical condition until after he had resigned from his position, he did not give his employer sufficient information for it to conclude that he was suffering from a "serious medical condition" which merited FMLA

protection. *Id.* Thus, the plaintiff's employer had no statutory duty to inquire further of the plaintiff to determine if he qualified for FMLA protection. *Id.*

2. Mr. Haefling Gave Adequate Notice to UPS of His Need for Leave.

Contrary to the plaintiffs in *Satterfield, Hammon* and *Gay*, Mr. Haefling gave UPS adequate notice that he was requesting leave for an FMLA-qualifying reason. The FMLA contains specific requirements when the need for leave is foreseeable. *See* 29 U.S.C. § 2612(e)(2)(B). In this case, Mr. Haefling testified that his condition did not cause him constant pain or prevent him from working every day, but was sporadic. (31a-32a). Therefore, it was not foreseeable that Mr. Haefling's neck injury would prevent him from work on any particular day.

The FMLA does not contain any notice requirement for unforeseeable leave. The regulations implementing the FMLA provide that when the need for leave is unforeseeable, an employee must give notice to his employer of "the need for leave as soon as practicable under the facts and circumstances of the particular case." 29 C.F.R. § 825.303(a) (1995).[1] Further, the regulations state that an employee need not expressly assert rights under the FMLA or even mention the FMLA, but need only state that leave is needed. 29

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[1] As noted by the court below, the final regulations did not become effective until after Mr. Haefling's absences and later termination of his employment from UPS. (*Haefling*, 169 F.3d at 498). However, the regulations regarding notice in effect at the time of Mr. Haefling's absences and termination were substantially similar to the final regulations. Further, as the court below points out, it is appropriate to refer to the final regulations to interpret the interim rules. *Id.* at 499. Therefore, this petition will cite to the final regulations.

C.F.R. § 825.303(b) (1995). The regulations clearly state, "[t]he employer will be expected to obtain any additional information through informal means." *Id.* (Emphasis added.) Similarly, 29 C.F.R. § 825.208(a) (1995) provides,

> [i]n all circumstances, it is the employer's responsibility to designate leave . . . as FMLA-qualifying. . . . In any circumstance where the employer does not have sufficient information about the reason for an employee's use of . . . leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the . . . leave is potentially FMLA-qualifying. (Emphasis added.)

As stated by the Sixth Circuit in *Hammon*, "an employee gives his employer sufficient notice that he is requesting leave for an FMLA-qualifying condition when he gives the employer enough information for the employer to reasonably conclude that an event described in [29 U.S.C. § 2612(a)(1)] has occurred." *Hammon*, 165 F.3d at 451. One of the events described in Section 2612(a)(1) is a "serious health condition" that makes the employee unable to perform the functions of the position of such employee. 29 U.S.C.§ 2612(a)(1)(D). In this case, each time Mr. Haefling was absent from work due to his spinal and neck injuries, he notified UPS that he would need to miss work due to the injuries. Specifically, UPS's employee record for Mr. Haefling notes the following reasons Mr. Haefling reported for his absences: "he was on medication for his back" and "neck problems". (82a-83a). UPS further demonstrated its awareness of Mr. Haefling's condition by sending him to a doctor who instructed Mr. Haefling on the use of prescription drugs while driving for UPS. (75a-76a).

The legislative history of the FMLA specifically states that Congress intended to protect workers such as Mr. Haefling with spinal and back injuries. The Senate Report discussing the FMLA provides:

> Examples of serious health conditions include but are not limited to heart attacks, heart conditions requiring heart bypass or valve operations, most cancers, "back conditions requiring extensive therapy" or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia, emphysema, severe arthritis, severe nervous disorders, "injuries caused by serious accidents on or off the job", ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth. All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery. . . . All of these health conditions require absence from work either for the condition or operation itself or for continuing medical treatment or supervision (e.g., "physical therapy" for accident victims or severe arthritis patients).

S. Rep. No. 103-3, at 29 (1993); reprinted in U.S.C.C.A.N. at 31 (Emphasis added). Mr. Haefling's situation is described three times in this portion of the legislative history: back conditions requiring extensive therapy, spinal injuries and physical therapy for accident victims, thus showing that Mr. Haefling's injuries are precisely the type of injuries that Congress intended to protect by enacting the FMLA. Therefore, it is clear that the information Mr. Haefling gave UPS provided UPS with sufficient notice that he suffered from a condition described in 29 U.S.C. § 2612(a)(1). Accordingly, UPS should have reasonably concluded that an FMLA-qualifying event may have occurred, and it was thus UPS's statutory duty to inquire further of Mr. Haefling to determine whether Mr. Haefling qualified for FMLA protection. UPS breached this statutory duty. Not only did UPS not inquire further of Mr. Haefling when he called in to notify the company of his condition, UPS waited until the summary judgment stage to first raise questions about Mr. Haefling's condition. It is unfair, inefficient and litigation-provoking for UPS to now raise such an issue.

In *Stubl v. T.A. Systems, Inc.*, the district court in the Eastern District of Michigan was faced with a similar situation. 984 F. Supp. 1075 (E.D. Mich. 1997). In that case, T.A. Systems, Inc. ("T.A.") had a company policy requiring employees to submit medical certification of any requested medical leave. However, when Mr. Stubl requested medical leave, T.A. did not inform Mr. Stubl of its requirement of medical certification. The court noted that the FMLA requires an employer to request medical certification before an employee may be required to provide certification. *Stubl*, 984 F. Supp. at 1086. The court stated, "[p]erhaps if T.A. had apprised Mr. Stubl of his rights, as required by law, he would have provided medical certification to T.A. to ensure he

would qualify for coverage under the Act." *Id.* at 1087. Similarly, if UPS had requested medical certification when Mr. Haefling first brought his condition to UPS's attention, Mr. Haefling, who was seeing a doctor for his condition, would have been able to produce medical certification, but UPS never gave Mr. Haefling this opportunity.

The court in *Manual* made the following observation which is pertinent to situations like Mr. Haefling's, "[w]e do not believe Congress intended to . . . require employees to consult attorneys before notifying their employer of their need for FMLA leave." 66 F.3d at 763. The FMLA was enacted to protect workers like Mr. Haefling who are not fully aware of their rights and obligations under the FMLA. Its purpose would be defeated if workers were required to be fully aware of their rights under the statute before they were allowed to exercise those rights. As stated by the court in *Manuel*, "[t]hese are workers, not lawyers." 66 F.3d at 763 (*citing D'Alia v. Allied-Signal Corp.*, 614 A.2d 1355, 1359 (N.J. Ct. App. 1992) (holding that "rights and benefits granted by [analogous state law] should not depend on the sophistication of the employee"). Congress, in enacting the FMLA, did not intend employees like Mr. Haefling to have to become conversant with the legal intricacies of the FMLA. *Manuel*, 66 F.3d at 764. Additionally, it is patently unfair for UPS to breach its statutory duty to inquire further of Mr. Haefling and request medical certification of his condition, if needed, and then to be able to rely on its breach of its statutory duty to defeat Mr. Haefling's inevitable claim.

Thus, in the case below, the Seventh Circuit's decision to place the burden on Mr. Haefling to verify/certify that he qualified for FMLA protection, when UPS failed in its statutory duty to inquire further of Mr. Haefling, is clearly

contrary to the decisions of the other three circuit courts which have addressed the issue. Further, such a decision is patently unfair to Mr. Haefling and other similarly-situated persons who may be unaware of their rights under the FMLA.

B. The Seventh Circuit's Decision is Not Necessary to Protect Employers from Unscrupulous Use of the Family and Medical Leave Act.

The Seventh Circuit's decision to place the burden on employees to certify their entitlement to FMLA leave is not necessary to protect employers from unscrupulous use of the FMLA. Indeed, the FMLA seeks to accomplish its purposes "in a manner that accommodates the legitimate interests of employers." 29 U.S.C. § 2601(b)(3) (see also, 29 C.F.R. § 825.101(b) ("The enactment of the FMLA was predicated on two fundamental concerns--the needs of the American workforce, and the development of high-performance organizations.") Consequently, the FMLA provides numerous measures to protect employers from employees attempting to invoke the protections of the FMLA for inappropriate reasons. As a preliminary matter, as noted in the cases discussed above, an employee must first give his employer adequate notice of his need for leave. *See e.g., Satterfield,* 135 F.3d at 980-81. If adequate notice is *not* given to the employer, the employer has no further duties under the Act. *Id.* (Emphasis added.)

Once an employee has given adequate notice, however, the employer has several options open to it to ensure fairness and the least litigious method of implementing the FMLA. First, the employer may inquire further of the employee through informal means. 29 C.F.R. § 303. Second, the employer may require the employee to provide medical

verification/certification of the employee's condition. 29 U.S.C.A. § 2613(a). Third, if the employer has reason to doubt the validity of the verification/certification, it may require a second opinion from a different physician. 29 U.S.C. § 2613(c). Finally, if the second opinion differs from the first, the employer may require a third opinion, which is "binding" on the employer and employee. 29 U.S.C. § 2613(d). Moreover, the employer may require verification/certification on a reasonable, ongoing basis. 29 U.S.C. § 2613(e). These procedures are sufficient to protect employers from unscrupulous use of the FMLA. *See Manuel*, 66 F.3d at 763-64 ("[The FMLA] does not leave employers . . . without protection from abuse of the Act's generous provisions . . . In short, the FMLA provides safeguards from delinquent employees. . . . "). Undoubtedly then, the FMLA provides safeguards against dishonest employees, but requiring an employee to prove his entitlement to FMLA leave years after the facts is not one of the safeguards. *See e.g. Manuel*, 66 F.3d at 764 ("In short, the FMLA provides safeguards from delinquent employees, but express notice by an employee that she takes leave pursuant to the FMLA is not one of those safeguards.").

C. The Seventh Circuit's Decision Defeats the Purpose of the Family and Medical Leave Act.

Congress enacted the FMLA to protect both employees and employers. The purposes of the FMLA include "balanc[ing] the demands of the workplace with the needs of families" and "entitl[ing] employees to take reasonable leave for medical reasons." 29 U.S.C. § 2601(b)(1) and (2). As noted by the cases discussed above, if employees are required to be fully aware of their rights under the FMLA before they may invoke those rights, the FMLA's goal of entitling

employees to take reasonable leave for medical reasons will be defeated. *See e.g.*, *Manuel*, 66 F.3d at 764. As stated by the Fifth Circuit in *Manuel*, "Congress, in enacting the FMLA, did not intend employee. . . . to become conversant with the legal intricacies of the Act." *Id.* The Seventh Circuit's requirement that an employee verify his entitlement to FMLA leave when he has not even been requested by his employer to do so, and is not aware that such certification can be required under the Act, would call for the employee to be "conversant with the legal intricacies of the Act." Thus, one of the purposes of the Act, to protect employees, would clearly be defeated by the Seventh Circuit's rule.

D. The Seventh Circuit's Decision in the Case Below Conflicts with the Decisions of Several Panels of the Seventh Circuit.

Additionally, two panels of the Seventh Circuit are in agreement with the Fifth, Sixth and Eleventh Circuits that the burden is on an employer to request additional information from its employee if such information is necessary to determine whether the employee qualifies for FMLA protection. *Stoops v. One Call Communications, Inc.*, 141 F.3d 309, 312 (7th Cir. 1998); *Price v. City of Fort Wayne*, 117 F.3d 1022, 1026 (7th Cir. 1997).

In *Stoops*, the court held that when an employee provides notice that leave is needed, the employer must investigate further if it needs additional information. 141 F.3d at 312. The court noted that an employee need not mention the FMLA when requesting leave. *Id.* (citing 29 C.F.R. §825.303(b) ("The employee need not expressly assert rights under the FMLA or even mention the FMLA . . . "). "In fact," the court stated, "the employee can be completely ignorant of

the benefits conferred by the Act: it is sufficient notice if the employee provides the employer with enough information to put the employer on notice that FMLA-qualifying leave is needed." *Id.*

Similarly, in *Price*, the employee filled out a leave request form indicating that the cause was "medical leave". The court found this information to be sufficient to put the employer on notice of a possible FMLA-qualifying leave. *Price*, 117 F.3d at 1025. The panel stated, "*[i]t was then the City's responsibility to inquire further.*" *Id.* at 1026. (Emphasis added.)

Thus, in the case below, the Seventh Circuit's decision to place the burden on the employee to certify that he qualifies for FMLA protection is clearly contrary to the decisions of the panels of the Seventh Circuit which have addressed the issue.

E. The Seventh Circuit's Rule Conflicts with Numerous District Court Decisions.

The conflict between the Seventh Circuit and the other courts of appeal is further confirmed by the numerous district court decisions which have reached a conclusion contrary to the Seventh Circuit in the case below. The following district courts have held it is an employer's statutory duty to inquire further if it is unclear whether an employee's request for leave qualifies for FMLA protection: *Mora v. Chem-Tronics, Inc.*, 16 F. Supp.2d 1192, 1209 (S.D. Cal, 1998); *Uema v. Nippon Express Hawaii, Inc.*, 26 F. Supp.2d 1241, 1247 (D. Haw. 1998); *Vargo Adams v. U.S. Postal Service*, 992 F. Supp. 939, 943 (N.D. Ohio 1998); *O'Hara v. Mr. Vernon Bd. Of Educ.*, 16 F. Supp.2d 868, 890 (S.D. Ohio 1998);

Bryant v. Delbar Products, Inc., 18 F. Supp.2d 799, 806 (M.D. Tenn. 1998); *Stubl v. T.A. Systems, Inc.*, 984 F. Supp. 1075, 1086 (E.D. Mich. 1997); *Johnson v. Primerica*, 1996 WL 34148 at *5 (S.D.N.Y. Jan. 30, 1996); *Hendry v. GTE North, Inc.*, 896 F. Supp. 816, 828 (N.D. Ind. 1995); *Brannon v. Oshkosh B'Gosh, Inc.*, 897 F. Supp. 1028, 1038 (M.D. Tenn. 1995)

Brannon, *Mora*, and *Stubl* are particularly illustrative. In *Brannon*, the court stated that the regulations implementing the FMLA make clear that an employee must tell her employer the reason she is absent from work before she will be entitled to FMLA protection. 897 F. Supp. at 1038. "After that, it [is] the employer's duty to make further inquiry to determine if the leave qualifie[s] for FMLA protection." *Id.* In that case, Brannon's employer failed to perform its statutory duty to further inquire after Brannon notified her employer that she would be absent to care for her ill daughter. The court first held that Brannon's statement that she would be absent to care for her daughter gave her employer sufficient notice that her absence was necessitated by an FMLA-qualifying reason. *Id.* at 1039. Significantly, though the court further held that because Brannon gave her employer sufficient notice, her absence was *per se* FMLA protected. *Id.* (Emphasis added). Accordingly, the court granted Brannon, the employee, summary judgment on the issue of her employer's liability under the FMLA. *Id.*

In *Mora*, the court emphasized that an employee need not expressly assert his rights under the FMLA or even mention the Act, but must merely state that leave is needed. 16 F. Supp.2d at 1209. "If further information [is] needed to determine whether the leave requested qualifie[s] under the FMLA, it [is the employer's] responsibility to inquire further

of [the employee] for that information." *Id.* (citing 29 C.F.R. § 825.302(c) ("In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave."). The court noted that when an employee first gives notice of his need for leave, employers who want medical certification, must give the employee specific, written notice of the requirement and the anticipated consequences for failing to meet this requirement. *Id.* Importantly, the court stated, "[E]mployers who fail to provide specific written requests for medical certification *may not take any action against the employee for failure to provide medical certification.*" *Id.* (Emphasis added). See also, 29 C.F.R. §825.301(f)(1995) (If an employer fails to provide written notification to an employee of the need to present medical certification, "the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.")

The court in *Stubl* emphasized that once an employee gives his employer notice that leave is needed, the "obligation then shifts to the employer to obtain any additional required information through informal means." 984 F.Supp. at 1086. In the case, Stubl informed his employer of his need for leave, citing the impact his son's death had on Stubl's personal health as the reason for the leave. The court held the burden then shifted to the employer to designate the leave as FMLA-qualifying and to obtain additional information to make that determination, if necessary. *Id.* The court pointed out that, under the FMLA, when an employer requires medical certification, it must give the employee notice of such a requirement. *Id.* Because Stubl's employer failed to notify Stubl of its requirement of medical certification, Stubl's

failure to provide such certification could not be used to preclude him from being covered under the FMLA. *Id.* at 1087.

In this case, because Mr. Haefling gave UPS sufficient notice that he would be absent for an FMLA-qualifying reason and UPS then failed to request absolutely any further information or certification, like the plaintiff in *Brannon*, Mr. Haefling should have been granted judgment as to UPS's liability. Additionally, as in *Stubl*, because UPS failed to notify Mr. Haefling that it wanted medical certification of Mr. Haefling's condition, Mr. Haefling's failure to provide such certification should not have been used to preclude him from being covered under the FMLA. What is more, as illustrated by the decision in *Mora*, because UPS failed to provide Mr. Haefling with a specific, written request for medical certification, UPS should be forbidden from taking any action against Mr. Haefling for failure to provide such certification. In clear contravention of these rules, UPS fired Mr. Haefling for his leave upon these occasions, and the Seventh Circuit affirmed UPS's extra-legal act. Thus, in the case below, the Seventh Circuit's decision to place the burden on the employee to verify/certify that he qualifies for the FMLA protection and to penalize the employee for failure to meet such burden, is plainly contrary to a large number of district courts which have addressed the issue.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be granted.

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June 2, 1999

(Any footnotes trail end of each document)

No. 97-1658

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Jack M. Haefling,
Plaintiff-Appellant,

v.

United Parcel Service, Inc.,
Defendant-Appellee.

November 12, 1998, Argued
March 4, 1999, Decided

COUNSEL: For JACK M. HAEFLING, Plaintiff - Appellant: Kevin W. Betz, Indianapolis, IN USA.

For UNITED PARCEL SERVICE, Defendant - Appellee: Daniel C. Emerson, BOSE, MCKINNEY & EVANS, Indianapolis, IN USA.

JUDGES: Before Flaum, Easterbrook, and Kanne, Circuit Judges.

OPINIONBY: KANNE

OPINION: Kanne, Circuit Judge. United Parcel Service ("UPS") terminated Jack Haefling's employment for poor attendance. Haefling filed suit against UPS alleging that his termination violated the Family and Medical Leave Act

("FMLA" or "Act"), and UPS moved for summary judgment. The district court granted this motion based on the court's conclusion that the undisputed facts failed to establish that Haefling "suffered from a serious medical condition" or that his condition rendered him "unable to perform the functions of his position" with UPS, as required by the FMLA. Because we agree with the district court's conclusion, we affirm.

I. History

UPS is engaged in the small package pickup and delivery business throughout most of the world. UPS employees pick up packages from customers and transport these packages to UPS distribution centers. Once these packages have been delivered to the distribution centers, the packages are sorted and loaded onto UPS feeder trucks for delivery to distribution hubs where the packages are again sorted, reloaded, and transported to the UPS centers nearest to the package's ultimate destination.

Jack Haefling began his employment with UPS in 1972 at the Terre Haute, Indiana, UPS facility. Haefling was hired initially as a part-time reloader. One year later, he accepted a position as a full-time feeder driver and was transferred to the Indianapolis Indiana, facility. In this capacity, Haefling hauled packages from one UPS site to another (principally between Indianapolis and Chicago). Haefling occupied this position from 1973 until his termination in 1995.

On April 18, 1994, a loaded dump truck struck the rear of an automobile driven by Haefling, aggravating a preexisting neck injury. Despite the accident and the aggravation of his neck injury, Haefling reported to work at UPS that evening and completed his shift. The following day Haefling drove to

the hospital where hospital personnel took x-rays of his neck. These x-rays ruled out any fractures in his neck and confirmed the presence of scar tissue from the previous injury. Haefling was treated and released with instructions to "take it easy." Haefling also received a prescription for hydrocodone to be taken for pain as needed.

Soon thereafter, Haefling retained the services of an attorney to represent him in a personal injury suit he filed against the other driver involved in the April 18, 1994, accident. As part of that litigation, the attorney arranged for Haefling to see a doctor for consultation. Haefling visited the doctor approximately ten times during the nine to ten month period following the accident. Haefling characterized his visits with the doctor as general checkups, lasting about twenty minutes apiece. During the course of these visits, Haefling described the pain in his neck and indicated that he had suffered from nauseous headaches on three occasions. Haefling continued to take hydrocodone for pain approximately twelve times throughout 1994.

The doctor referred Haefling to the Rehabilitation Hospital of Indiana for physical therapy. From May 1994 until March 1995, Haefling attended twenty to thirty physical therapy sessions, during which physical therapists rubbed his neck, conducted muscle exercises, and applied heat and ultrasound therapy. Haefling also continued to take a muscle relaxant on the seven or eight occasions when, according to his description, his neck "locked up." Haefling was never admitted to any hospital or other health care facility for his neck injury, and there was no indication that the injury limited his daily activities. However, Haefling described his ability to perform the functions as a feeder driver for UPS as "spasmodic." Between the date of the accident and the

termination of his employment with UPS, Haefling attributed nine absences from work as resulting from his neck injury.

UPS relies upon an informal employee attendance policy, pursuant to which employees are expected to maintain an absence rate below four percent of their scheduled workdays in any rolling 200 workday period. In enforcing its policy, UPS considers both the total number of days that an employee is absent, as well as the total number of "occurrences" resulting from an employee's absences. An "occurrence" is defined by UPS as consecutive days of absence uninterrupted by a day worked. UPS generally considers individuals with more "occurrences" to have worse attendance records than individuals who have been absent the same number of days, but with fewer "occurrences." Employees who violate UPS's absenteeism policy are subject to progressive discipline ranging from verbal reprimands to termination.

UPS eventually terminated Haefling's employment as a result of his excessive absenteeism and his failure to abide by UPS's attendance policy. During the period leading up to the termination of Haefling's employment, the attendance records for Haefling maintained by UPS indicate that he was absent from work at least thirty-two of the 257 days he was scheduled to work (an absence rate of approximately twelve percent). The district court relied on Haefling's personal diary to establish Haefling's attendance rate for this same period. This diary, which purportedly contained Haefling's notes on his own attendance, off-set some of the absences contained in UPS's attendance records. However, the diary still indicated that Haefling missed twenty-five scheduled work days, which, in part, constituted seventeen occurrences. In examining the two hundred day period immediately

preceding the termination of Haefling's employment, the district court found that Haefling missed eighteen days on eleven occurrences for reasons ranging from heat exhaustion, to a suspended license, to the flu. Of those eighteen absences, only seven days and five occurrences are attributed to Haefling's neck injury according to the district court's reading of Haefling's diary.

UPS matched Haefling's escalating number of absences with escalating levels of disciplinary measures. The disciplinary measures initially were limited to oral reprimands and warning letters. Despite repeated reprimands and warnings, Haefling's attendance failed to improve. UPS eventually issued Haefling a suspension on September 26, 1994, and a final warning on November 10, 1994. On December 27, 1994, UPS terminated Haefling for excessive absenteeism and for violating the November 10, 1994, final warning.

In response to his termination, Haefling filed a grievance pursuant to a collective bargaining agreement and continued to work for UPS during the resolution of this grievance. Following a hearing before the grievance board on this matter, the termination was reduced to yet another final warning and Haefling was offered a second "last chance" to improve his attendance. Haefling missed work from February 15, 1995, to February 17, 1995, claiming he was suffering from the flu. On February 20, 1995, UPS again terminated him. Haefling filed a second grievance asserting, in part, that this termination violated the FMLA. This grievance was ultimately denied, and Haefling's discharge was upheld.

Haefling filed suit against UPS in district court alleging that the termination of his employment violated the FMLA. Specifically, Haefling claimed that UPS terminated his

employment because of absences directly related to a "serious health condition" as this phrase is defined by the FMLA and, therefore, the termination of his employment was improper. UPS moved for summary judgment. The district court granted UPS's motion based on the court's conclusion that Haefling failed to raise a genuine issue of material fact regarding his entitlement to protection under the FMLA. Specifically, the court determined that Haefling failed to present sufficient evidence to establish that he suffered from a "serious health condition" that rendered him "unable to perform the functions of [his] position" as the FMLA required. Haefling now appeals.

II. Analysis

A. Standard of Review

We review a district court's grant of summary judgment de novo, drawing our own conclusions of law and fact from the record before us. See Thiele v. Norfolk & Western Ry. Co., 68 F.3d 179, 181 (7th Cir. 1995). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986). In determining whether a genuine issue of material fact exists, courts must construe all facts in the light most favorable to the non-moving party and draw all reasonable and justifiable inferences in favor of that party. See Bombard v. Fort Wayne Newspapers, Inc., 92 F.3d 560, 562 (7th Cir.

1996). "A genuine issue for trial exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole." Roger v. Yellow Freight Sys., Inc., 21 F.3d 146, 149 (7th Cir. 1994).

B. The FMLA Claim

Under the FMLA, eligible employees may take twelve work weeks of leave within a twelve month period in the event that the employee suffers from a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(1)(D). At the conclusion of the qualified leave period, the employee is entitled to reinstatement to the position the employee previously held or to an equivalent one with the same terms and benefits that existed prior to the exercise of leave. 29 U.S.C. § 2614(a). The FMLA further provides that it is "unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any right provided under" the Act. 29 U.S.C. § 2615(a)(1).

In the present case, the district court granted UPS's motion for summary judgment, in part, based on the court's determination that Haefling failed to establish that he suffered from a "serious health condition."[1] A "serious health condition" is defined under the FMLA as "an illness, injury, impairment, or physical or mental condition that involves . . . inpatient care . . . or continuing treatment by a health care provider." 29 U.S.C. § 2611(11).

Although the language of the Act provides little guidance on the meaning of the phrase "serious health condition," the Department of Labor issued regulations addressing the meaning of this phrase pursuant to an express congressional

delegation of authority to the Secretary of Labor to promulgate regulations "necessary to carry out" the FMLA. See 29 U.S.C. § 2654. However, the final regulations did not become effective until after Haefling's absences and resulting termination from UPS. See 60 Fed. Reg. 2180 (1995), amended by 60 Fed. Reg. 6658 (1995) (deferring effective date of the final regulations until April 6, 1995); see also Stoops v. One Call Comm., Inc., 141 F.3d 309, 311 (7th Cir. 1998). Regulations, like statutes, cannot be applied retroactively without express direction to do so. See Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). "Because the FMLA's grant of authority to the Secretary of Labor to promulgate regulations . . . does not affirmatively grant her the authority to make those regulations retroactive, and because the final regulations themselves do not provide any indication that they are to be applied retroactively," Bauer v. Varity Dayton-Walther Corp., 118 F.3d 1109, 1111 n.1 (6th Cir. 1997), the final regulations do not govern this case.

At the time of Haefling's termination, interim final rules defining the phrase "serious health condition" had been issued by the Department of Labor as a precursor to the final regulations. The interim final rules are applicable to this case. These rules defined the phrase "serious health condition" as "an illness, injury, impairment, or physical or mental condition" that involves one of the three following situations:

> (1) Any period of incapacity or treatment in connection with or consequent to inpatient care (i.e., overnight stay) in a hospital, hospice, or residential health care facility;

> (2) Any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or
>
> (3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days; or for prenatal care.

29 C.F.R. § 825.114(a)(1)-(3) (1993).

Whether an illness or injury constitutes a "serious health condition" under the FMLA is a legal question that an employee may not sidestep in the context of summary judgment merely by alleging his condition to be so. We have explained that in the context of the substantive statutory rights contained within the FMLA, an employee must demonstrate by a preponderance of the evidence that he is entitled to the disputed leave. See Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711, 713 (7th Cir. 1997) ("We shall continue to resolve suits under the FMLA . . . by asking whether the plaintiff has established, by a preponderance of the evidence, that he is entitled to the benefit he claims."). In the present case, Haefling did not receive "inpatient care" for his neck injury. Therefore, he must point to evidence in the record showing that his neck injury falls within one of the

two remaining categories in order to establish that he suffered from a "serious health condition."

We consider first whether sufficient evidence exists demonstrating that Haefling's neck injury resulted in a "period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider." 29 C.F.R. § 825.114(a)(2) (1993). The interim final rules contemplate a two-pronged showing to be made by the plaintiff. The plaintiff must make a threshold demonstration that the illness or injury at issue resulted in an incapacity requiring absence from work or school or an absence from or an inability to perform daily activities for more than three calendar days. The plaintiff must then show that he received continuing treatment as a result of this incapacity. Without such a showing, the plaintiff cannot rely on this definition of a "serious health condition" to defeat a motion for summary judgment.

Although the period of "more than three calendar days" is not modified by the inclusion of the requirement that the three calendar days be consecutive, it is our conclusion that the interim rules should be read so as to require the period of incapacity to span consecutive days. First, it is appropriate to refer to the final regulations promulgated by the Department of Labor as an aid to interpret the interim final rule. See Victorelli v. Shadyside Hosp., 128 F.3d 184, 186 (3d Cir. 1997) (referring to the final regulations as an aid in interpreting the interim final rules); see also Hodgens v. General Dynamics Corp., 144 F.3d 151, 162 n.8 (1st Cir. 1998) ("It is arguable that we should read the word 'consecutive' into the interim regulations as well. We will

analyze the present case as if more than three consecutive days' absence were required."). The final regulations require the period of incapacity to span "more than three consecutive calendar days." 29 C.F.R. § 825.114(a)(2)(i) (1998). Second, the FMLA was designed to cover serious illnesses that last more than a few days. It is hardly plausible that Congress intended to elevate minor illnesses lasting a day or two to the stuff of federal litigation. This result would certainly occur if an employee was permitted to piece together nonconsecutive days of incapacitation in order to invoke the protections afforded by the FMLA. Accordingly, in order for an employee to establish that his illness or injury falls within this prong, a plaintiff must demonstrate that the duration of the incapacity lasted more than three consecutive calendar days.

In the case before us, Haefling would have to overcome a significant obstacle--his own diary-- to convince us that any period of incapacity he suffered as a result of his neck injury extended beyond three consecutive calendar days. In order to establish incapacity, a plaintiff must show that the condition at issue requires absence from work or school or results in an absence from or an inability to perform other daily activities. The diary Haefling submitted to the district court documenting his absences from UPS provides no indication that his neck injury required him to be absent from work for more than three consecutive days. At most, the diary shows that Haefling was unable to attend work as a result of his neck injury on July 28-29 and on August 1. Haefling was not scheduled to work on either July 30 or July 31. Even if we were to conclude that an employee could string together absences from work and absences from routine daily activities to establish a period of incapacity (as Haefling argues), the record is devoid of any evidence demonstrating that his neck injury resulted in an inability of Haefling to

perform routine daily activities on the days he was not scheduled to work. The diary provides no assistance; it merely states: "Still sick." Haefling's deposition testimony also belies his claim of incapacitation with regard to his ability to perform daily activities on those days. Haefling testified that: he was able to take care of himself; he was able to eat and drink; the injury did not interfere with his ability to engage in marital relations; and he was able to learn.

While a list of routine daily activities would certainly encompass more than eating, drinking, and learning, Haefling has simply failed to adduce any evidence that would demonstrate a period of incapacity greater than three consecutive days. In the context of the FMLA, when an illness or injury spans a period of time during which an employee is not scheduled to work, it is arguable that the interim final rules contemplate that an employee may submit evidence that demonstrates an absence from or an inability to perform regular daily activities. This showing would not be a difficult one. However, the complete lack of evidence in the record on this issue makes it impossible for Haefling to demonstrate entitlement to leave under this broad definition of a "serious health condition." Although it may be a reasonable inference that a feeder driver employed by UPS who was unable to perform routine daily activities would probably be unable to attend work, the inverse is not necessarily true. And while all reasonable inferences must be drawn in favor of the party opposing summary judgment, we are under no obligation to draw these inferences from assumptions that are unsupported by the record. Such would be the result if we assumed that a condition rendering an employee incapable of performing his work duties automatically rendered the employee incapable of performing daily activities. Accordingly, Haefling's failure to come

forward with any evidence that the condition of his neck precluded him from performing certain daily activities necessarily precludes a finding that his injury incapacitated him for a period of more than three consecutive days.

Haefling also fails to establish that his condition falls within the remaining provision of the interim final rules defining the phrase "serious health condition." The remaining provision requires the plaintiff to establish that the injury or illness involves "continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days . . . ." 29 C.F.R. § 825.114(a)(3) (1993). The interim final rules identify persons suffering from Alzheimer's disease, persons who have suffered a severe stroke, or persons in the terminal stages of a disease who may not be receiving active medical treatment, as examples of individuals suffering from serious or incurable long-term or chronic conditions. 29 C.F.R. § 825.114(b)(3) (1993).

We conclude that the evidence in the record also falls short of satisfying this definition of a "serious health condition." The record does not contain any evidence demonstrating that Haefling's neck injury constituted a chronic or long-term health condition of the severity contemplated by the FMLA. Indeed, although Haefling testified in his deposition that he visited a doctor upon referral by his attorney and attended physical therapy sessions, there is no evidence in the record establishing that Haefling's condition required any medical treatment whatsoever. The interim final rules specifically exclude voluntary treatments "which are not medically necessary" from the definition of "serious health condition." See 29 C.F.R. § 825.114(c) (1993). Haefling did not submit

an affidavit from his own doctor or any other medical personnel demonstrating the necessity of the "treatments" he supposedly received, and Haefling's own self-serving assertions regarding the severity of his medical condition and the treatment it required are insufficient to raise an issue of fact on this point. The complete dearth of evidence submitted by Haefling on this issue compels the conclusion that Haefling is incapable of establishing that he suffered from a "serious health condition," as this term is defined by the FMLA.

III. Conclusion

Because we conclude that the evidence in the record before us is insufficient to establish a genuine issue of material fact regarding whether Haefling suffered from a "serious health condition" under the FMLA, we AFFIRM the judgment of the district court.

----------Footnotes----------

[1] The district court concluded in the alternative that even if Haefling could establish that he suffered from a "serious health condition," tne record contained no evidence demonstrating that such a condition rendered him unable to perform the functions of his position as the FMLA required. Because we conclude that Haefling did not suffer from a "serious health condition," we need not consider whether he was unable to perform the functions of his position at UPS.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Filed: 12/31/96

JACK M. HAEFLING
Plaintiff

v.

UNITED PARCEL SERVICE
Defendant

Cause No. IP 95-03410C H/G

ENTRY ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Jack M. Haefling began working for defendant United Parcel Service ("UPS") in 1972. Beginning in 1976, he worked as a feeder driver on the Indianapolis to Chicago route. (Feeder drivers operate semi-tractor trailers carrying packages to distribution hubs.) in 1994, Haefling was absent from work many times. After pursuing a course of progressive discipline. UPS terminated Haefling on February 20, 1995, for poor attendance.

Haefling alleges that his attendance problem can be partially attributed to a cervical spine or neck injury caused by an automobile collision on April 18, 1994. He filed suit in this court alleging that his termination violated the Family and Medical Leave Act of 1993. 29 U.S.C. § 2601 et seq ("FMLA"). UPS has moved for summary judgment UPS

contends that the undisputed facts show that Haefling did not suffer from a "serious medical condition" as defined by the FMLA. that his job performance did not minimally satisfy UPS's legitimate expectations, that other similarly situated UPS employees were not treated more favorably than Haefling, and that Haefling has offered no evidence of discriminatory motive. Haefling responds that his neck injury constitutes a serious medical condition (specifically, a "chronic serious health condition" as that term is used in the FMLA regulations), that his attendance record (excluding the absences attributable to the neck condition) did not violate UPS's attendance policy, and that other UPS employees with similar attendance problems were treated more favorably, raising an inference of discriminatory motive.

While its motion for summary judgment was pending, UPS filed a motion for leave to file an amended answer to add a new affirmative defense:

> this court lacks subject matter jurisdiction over the above-captioned matter because Mr. Haefling's claims are subject to mandatory and binding arbitration under the terms of the applicable collective bargaining agreement negotiated between UPS and Mr. Haefling's union. . . Moreover, the final and binding resolution of Mr. Haefling's grievance through the bargained-for grievance and arbitration procedure further bars this lawsuit.

Proposed Amended Answer at 4. For the reasons explained below, the court grants defendants motion for summary judgment and denies defendant's motion for leave to amend

answer. Also pending is plaintiff's motion to strike defendant's "Report of Administrative Action." That motion is granted.

Defendant's Motion for Summary Judgment

I. Summary Judgment Standard

Summary judgment should be granted when the pleadings and the supplemental material submitted to the court present no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986). A genuine issue of material fact exists if there is sufficient evidence for a reasonable jury to find in favor of the non-moving party on the particular issue. E.g., Methodist Medical Ctr. of Ill. v. American Medical Sec. Inc., 38 F.3d 316, 319 (7th Cir. 1994). On summary judgment. the court must give the non-moving party the benefit of all reasonable inferences permitted by the evidence. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986); James v. Merchants Nat'l Bank & Trust Co ,42 F.3d 1054, 1057 (7th Cir. 1994). Also, the court may not weigh the credibility of conflicting evidence in deciding a motion for summary judgment. In considering defendant's motion for summary judgment, therefore, the court must consider the record evidence in the light most favorable to plaintiff Under this court's Local Rule 56.1, however, the court will treat as undisputed all facts claimed and supported by admissible evidence by the moving party, except to the extent that such facts are properly controverted by the opposing party's statement of genuine issues. If application of these standards shows that the moving party is entitled to judgment as a matter of a law, there is no need for a trial and summary judgment must be granted.

II. Undisputed Facts

The following facts are undisputed or reflect the record evidence in the light reasonably most favorable to plaintiff. UPS operates an international package pick up and delivery service. UPS drivers pick up packages from customers and transport them to UPS distribution centers. At the distribution centers packages are sorted and loaded onto semi-tractor trailers called "feeders" for overnight delivery to a distribution hub close to the ultimate destination. Local 135 of the International Brotherhood of Teamsters represents UPS feeder drivers in Indianapolis for purposes of collective bargaining.

In 1972, UPS hired Haefling to work as a part-time reloader in the Terre Haute. Indiana, facility. Haefling became a full-time fueler-washer, then a package car driver, and then a feeder driver. In 1976. Haefling transferred to the UPS distribution center in Indianapolis, Indiana. Haefling worked a 6:00 p.m. to 6:00 a.m. shift, driving a feeder truck on the Indianapolis to Chicago route.

Haefling alleges that he qualifies for FMLA protection based on a neck injury sustained in an automobile accident. On April 18, 1994, a loaded dump truck collided with Haefling's automobile, aggravating a pre-existing neck injury. Haefling reported for work at 6:00 p.m. on April 18, 1994, and drove a feeder truck to Chicago and back. On April 19. 1994. Haefling drove himself to the Methodist hospital emergency room in Indianapolis. Hospital personnel took x-rays which ruled out fractures and confirmed the presence of scar tissue from an earlier injury. Hospital personnel told Haefling "to take it easy" and prescribed Hydrocodone for

pain, as needed. Haefling missed two or three days of work following the automobile accident.fn2

After the accident, Haefling hired an attorney. Stanley Kahn. to represent him in a lawsuit against Hunt Paving, the owner of the dump truck that struck his automobile. Kahn referred Haefling to Dr. Stephen Segal, whom Haefling visited approximately ten times over a nine to ten month period following the accident. The visits to Dr. Segal consisted of general checkups lasting about twenty minutes each. (Haefling Dep. at 90-91) Haefling described a sharp, shooting pain running down his neck, and noted three occasions when he suffered a "nauseous headache." (Haefling Dep. at 47) Haefling took Hydrocodone approximately eleven or twelve times in 1994. (Haefling Dep. at 54) Dr. Segal also referred Haefling to the Indiana Rehabilitation Center for physical therapy. From May 1994 until March 1995, Haefling attended physical therapy sessions approximately twenty to thirty times. During these sessions, physical therapists rubbed his neck, applied heat, conducted muscle exercises, and applied ultrasound therapy. (Haefling Dep. at 43) Haefling also took Flexeril, a muscle relaxer, when his neck "locked up" on seven or eight occasions over a seven or eight month period. (Haefling Dep. at 49-50) Haefling testified that his neck injury did not limit his daily activities but that his ability to work as a feeder driver was "spasmodic." (Haefling Dep. at 5 1-52)

UPS attendance policy requires all employees to maintain an absence rate below four percent of their scheduled workdays in any rolling 200 workday period. For purposes of discipline. UPS considers both the total number of days absent and the total number of "occurrences, meaning consecutive absences uninterrupted by a day worked. UPS considers employees with more occurrences to have worse

attendance records than employees who have been absent the same number of days, but with fewer occurrences. UPS employs a system of progressive discipline to sanction employees who violate the attendance policy. Progressive discipline consists of: (i) oral reprimand and counseling; (ii) warning and suspension letters; and (iii) termination.

The parties disagree on Mr. Haefling's exact attendance record. Haefling disputes both the number of days absent and the reasons for those absences. Viewing the facts in the light reasonably most favorable to the plaintiff, as the court must in deciding a motion for summary judgment, Haefling was absent from work as follows:

DATE ABSENT	REASON	SOURCE OF INFORMATION
January 19, 1994	(medical)	Grievance fn3
January 26, 1994	(medical)	Grievance
February 18, 1994	(medical)	Dep. at 66-67fn4
March 21, 1994	(medical)	Grievance
March 31, 1994	(medical)	Grievance
April 19, 1994	(neck injury)	Dep. at 68; Grievance
April 20, 1994fn5	(neck injury)	Dep. at 68; Grievance
May 27, 1994	(neck injury)	Diaryfn6; Grievance
June 21, 1994fn7	(heat exhaustion)	Dep. at 75; Grievance; not noted in Haefling Diary

July 28, 1994	(neck injury)	Haefling Diary; Grievance
July 29, 1994	(neck injury)	Haefling Diary; Grievance
August 1, 1994	(neck injury)	Haefling Diary; Grievance
August 12, 1994	(congestion)	Haefling Diary;
August 13, 1994	(congestion)	Haefling Diary
September 14, 1994fn8	(suspended license)	Dep. at 81; Grievance; Haefling Diary
September 15, 1994	(suspended license)	Dep. at 81; Haefling Diary; not noted in Grievance
September 16, 1994	(suspended license)	Dep. at 81; Haefling Diary; not noted in Grievance
October 17, 1994	(neck injury)	Haefling Diary
October 26, 1994	(suspended by UPS)	Dep. at 83fn9
November 4, 1994	(neck injury)	Haefling Diary
December 28, 1994	(neck injury)	Haefling Diary
January 18, 1995	(union hearing)	Dep. at 88
February 15, 1995	(flu)	Dep. at 88
February 16, 1995	(flu)	Dep. at 88
February 17, 1995	(flu)	Dep. at 88

This list shows that Haefling was absent for five days on five occurrences in 1994 before his April 18, 1994, automobile accident.fn10 This list also indicates that Haefling's neck injury caused him to be absent on nine days over six occurrences. None of these occurrences involved absence of more than three consecutive workdays. From April 1994 to February 1995, Haefling was absent on eleven days and six occurrences unrelated to his neck injury. Over the period January 1994 to February 1995, that adds up to twenty-five days absent on seventeen occurrences. Looking at the 200 day period immediately preceding Haefling's termination, Haefling was absent a total of eighteen days on eleven occurrences. Of those absences, seven days and five occurrences are attributed by Haefling to the neck injury.fn11

UPS took several disciplinary actions related to Haefling's record of attendance. Oral reprimands were directed to Haefling on the following dates: January 27, March 28, April 1, June 1, August 17, October 24, and November 17, 1994. Warning letters were requested on April 1 and June 1, 1994, and a warning letter was issued on June 4, 1994. Haefling filed a grievance challenging the warning letter. On August 17, a suspension was requested, and on September 6 1994, a suspension letter was issued, On November 10, 1994, Haefling received a "final warning." On December 27, 1994, UPS terminated Haefling for excessive absenteeism and for violating the November 10, 1994. final warning. Haefling pursued a grievance of this termination pursuant to the collective bargaining agreement. He continued to work pending resolution of this grievance. Following a hearing, the UPS-Local 135 Joint Grievance Committee Panel reduced Haefling's discharge to a second "final warning." After Haefling missed work from February 15 to February 17, 1995, UPS again terminated Haefling on February 20, 1995, for

excessive absenteeism. Haefling filed another grievance but was not permitted to continue working pending resolution of this grievance. The UPS-Local 135 Joint Grievance Committee Panel denied the grievance and upheld Haefling's February 20, 1995, discharge.

III. Eligible Employees under the FMLA

Among other rights, the FMLA protects the right of eligible employees to take up to twelve workweeks of unpaid leave during any twelve month period because a "serious health condition" makes the employee unable to perform the functions of his or her position. 29 U.S.C. § 2612(a)(1)(D). The FMLA also prohibits employers from interfering with or denying the exercise of rights protected by the Act. 29 U.S.C. § 2615(a). Haefling claims that UPS violated 29 U.S.C. § 2615 by disciplining him for absences that qualify as authorized medical leave under 29 U.S.C. § 2612(a)(1)(D).

A. The Class of Persons Protected Under the FMLA

The FMLA affords legal protection only to statutorily defined "eligible employees" in particular statutorily defined situations. See 29 U.S.C. § 2612(a)(1). To be an "eligible employee," a person must have been employed for at least twelve months by the employer of whom leave is requested, and the employee must have worked for at least 1,250 hours for that employer during the prior twelve month period. 29 U.S.C. § 2611(2). The parties agree that in 1994, Haefling had been a full-time employee of UPS for more than twenty years. Haefling is an eligible employee under the FMLA. The

parties also agree that UPS is an employer covered by the FMLA. See 29 U.S.C. § 26.1 1(4).

B. "Serious Health Condition"

Employees who meet the hours and duration of employment requirements are entitled to take leave under the FMLA's protection only in specific situations. Congress enacted the FMLA in order "to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has a serious health condition." 29 U.S.C. § 260 1(b)(2). The FMLA specifies four situations in which employees will be entitled to leave. Haefling relies on the fourth one: "'Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee" 29 U.S.C. § 26121(a)(l)(D). The first contested issue in this case is whether Haefling's neck injury constitutes a "serious health condition" within the meaning of the FMLA.

The Act defines "serious health condition" as follows:

> The term "serious health condition" means an illness, injury, impairment, or physical or mental condition that involves—
>
> (A) inpatient care in a hospital, hospice, or residential medical care facility: or
>
> (B) continuing treatment by a health care provider.

29 U.S.C. § 2611(11). Haefling did not receive inpatient care in a hospital or other residential medical care facility for his neck injury. His only visit to the hospital was as an outpatient for approximately four hours an the day after the automobile accident, Haefling's condition therefore does not satisfy the requirements of 29 U.S.C. § 2611(11)(A). Whether Haefling's neck injury constitutes a serious health condition therefore depends on whether his visits to Dr. Segal and the Indiana Rehabilitation Center constitute "continuing treatment by a health care provider" within the meaning of 29 U.S.C. § 2611(11)(B).

In interpreting the statute and regulations to decide this question, the court must keep in view the overall purposes of the FMLA. The Act was enacted primarily to help employees balance their responsibilities to their families and their responsibilities to their employers. The FMLA was intended to achieve this purpose while also accommodating the legitimate interests of employers. 29 U.S.C. § 260 1(b). The principal mechanism for achieving this balance is a requirement that employers allow an employee up to twelve weeks per year of unpaid leave without significant penalty. See generally 29 U.S.C. §§ 2601, 2612. Thus, where an employee's own poor health or a family member's poor health is the reason for FMLA leave, the Act applies only to "a serious health condition." 29 U.S.C. § 2612(a)(1)(C) & (D). This provision of the FMLA was aimed at genuinely serious and incapacitating conditions. It was not intended to mandate, as a matter of federal law, a uniform national sick leave policy for minor or temporary illnesses and discomforts. S. Rep. No. 103-3, at 28 (1993); reprinted in 1993 U.S.C.C.A.N. 3,30.

The definition of a "serious health condition" is therefore critical to accomplishing the FMLA's goals while confining it to the intended scope. The Senate Report provided a non-exhaustive list of "serious health conditions" for purposes of the FMLA:

> Examples of serious health conditions include but are not limited to heart attacks, head conditions requiring heart bypass or valve operations, most cancers, back conditions requiring extensive therapy or surgical procedures, strokes, severe respiratory conditions, spinal injuries, appendicitis, pneumonia. emphysema, severe arthritis, severe nervous disorders, injuries caused by serious accidents on or off the job, ongoing pregnancy, miscarriages, complications or illnesses related to pregnancy, such as severe morning sickness, the need for prenatal care, childbirth and recovery from childbirth. All of these conditions meet the general test that either the underlying health condition or the treatment for it requires that the employee be absent from work on a recurring basis or for more than a few days for treatment or recovery. They also involve either inpatient care or continuing treatment or supervision by a health care provider, and frequently involve both. For example, someone who suffers a heart attack generally requires both inpatient care at a hospital and ongoing medical supervision after being released from the hospital: the patient must also be absent from work. Someone who has suffered a serious industrial accident may require initial lengthy treatment in a hospital and periodic physical therapy under medical supervision thereafter. A cancer patient may need to have periodic

> chemotherapy or radiation treatments, and a patient with severe arthritis may require periodic treatment such as physical therapy.

S. Rep. No. 103-3, at 29; reprinted in 1993 U.S.C.C.A.N. at 31. Further mapping of the line between a covered "serious health condition" and a less serious condition was left to the Department or regulations and to the courts as they apply the general language to specific cases. The ions define "serious health condition" as follows:

> an illness, injury, impairment, or physical or mental condition that involves:
>
> (1)Impatient care (i.e., an overnight stay) in a hospital
>
> (2)Continuing treatment by a health came provider. A serious health condition involving continuing treatment by a health care provider includes any one or more of the following:
>
> (i)A period of incapacity (i.e. inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:
>
> (A)Treatment two or more times by a health care provider, by a nurse or physician's assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by. a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

(ii)Any period of incapacity due to pregnancy, or for prenatal care.

(iii) Any period of incapacity or treatment for such incapacity due to a chronic serious health condition. A chronic serious health condition is one which:

(A)Requires periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider.

(B)Continues over an extended period of time (including recurring episodes of a single underlying condition); and

(C)May cause episodic rather than a continuing period of incapacity (e.g. asthma, diabetes, epilepsy, etc.).

29 C.F.R. § 825.114(a). Haefling did not receive inpatient hospital care for his neck injury, so 29 C.F.R. § 825.1 14(a)(1) does not apply. Haefling admitted in deposition testimony that his neck injury never caused a him to miss more than three consecutive days of work (Haefling Dep. at 53), so 9 C.F.R. § 824.114(a)(2)(i) does not apply. Haefling relies only on 29 C.F.R. § 825.114 (a)(2)(iii), which covers a period of incapacity or treatment for incapacity due to a "chronic serious health condition." (See Pl. Opposition Brief at 10-1l)

The provisions for "chronic serious health conditions" are especially important for ensuring the FMLA can achieve its purpose without reaching much farther than Congress and the President intended. in many of these situations. unlike many acute serious health conditions, there is likely to be less objective evidence of the employee's need for leave or the seriousness of the condition. If the term were defined too loosely, the FMLA could reach even relatively minor and temporary illnesses, aches, and pains sufficient to convince an employee to take a day off without pay from time to time.

In order to establish that his neck injury constitutes a "chronic serious health condition" within the meaning of the regulation, Haefling must show that his condition required periodic visits for treatment with a health care provider, or a nurse or physician's assistant under direct supervision of a health care provider, that his condition continued over an extended period of time, and that his condition may cause episodic rather than a continuing period of incapacity. See 29 C.F.R. § 825.1 14(a)(2)(iii). Haefling's record of "treatment" consists often visits to Dr. Segal and twenty to thirty visits to physical therapists at the Indiana Rehabilitation Center. The regulations exclude physical therapists from the definition of "health care provider." 29 C.F.R. § 825.800. The regulations also define "treatment";

> Treatment for purposes of [29 C.F.R. § 825.114(a)] includes (but is not limited to) examinations to determine if a serious health condition exists and evaluations of the condition. Treatment does not include routine physical examinations, eye examinations or dental examinations. Under [29 C.F.R. § 800.1 14(a)(2)(i)(B)]. a regimen of continuing treatment includes, for example. a course of prescription

> medication (e.g., an antibiotic) or therapy requiring special equipment to resolve or alleviate the health condition (e.g., oxygen). A regimen of continuing treatment that includes the taking of over-the-counter medications such as aspirin. antihistamines, or salves; or bedrest, drinking fluids, exercise, and other similar activities that can be initiated without a visit to a health care provider, is not, by itself, sufficient to constitute a regimen of continuing treatment for purposes of FMLA leave.

29 C.F.R. § 825.114(b).

To determine whether Haefling's neck injury qualifies as a chronic serious health condition, the court must closely evaluate the undisputed facts concerning his record of treatment and apply the standards set forth in 29 C.F.R. § 825.1 14.fn13 After the automobile accident on April 18. 1994. Haefling worked his regular shift from 6:00 p.m. on April 18 until 6:00 a.m. on April 19 On April 19, 1994, he drove himself to the Methodist Hospital emergency room where staff took x-rays. The x-rays ruled out any fractures and confirmed the presence of pre-existing scar tissue from an accident that had occurred in the past. (Haefling Dep. at 39) Haefling received instructions to "take it easy." (Haefling Dep. at 39) Haefling was also given Hydrocodone,fn14 a prescription pain medication, and was instructed to continue taking Flexeril,fn15 a muscle relaxant that had been prescribed to him after a prior injury (Haefling Dep. at 40)

Following the accident, Haefling's attorney referred him to Dr. Stephen Segal. Haefling saw Dr. Segal ten times over a nine to ten month period following the accident. (Haefling Dep. at 46) During these brief visits. Dr. Segal

examined Haefling's neck by poking and prodding and checking the range of motion. (Haefling Dep. at 90) Haefling was asked about his visits to Dr. Segal at his deposition: "There wouldn't be actual treatments. It was just kind of seeing how you were doing?" Haefling replied. "Right." (Haefling Dep. at 91)

In May 1994, Haefling began a physical therapy program at the Rehabilitation Hospital of Indiana. (Haefling Dep. at 42-44) Haefling termed his treatments "massages" and related that the procedures included rubbing his neck, applying heat doing exercises, and ultrasound. (Haefling Dep. at 43) Haefling stated that an unspecified doctor prescribed two or three treatments per week. but Haefling testified that he attended "probably twenty or thirty times"' from May 1994 through February or Match 1995. (Haefling Dep. at 44) Haefling then explained that as he experienced spasms and locking up in his neck, he attended physical therapy sessions more frequently. (Haefling Dep. at 45)

Even viewed in the light most favorable to Haefling, this medical history shows that his neck injury does not constitute a "chronic serious health condition'" within the meaning of 29 C.F.R. § 825.1 14(a)(2)(iii). The evidence before the court would not permit a reasonable jury to find that Haefling's condition required periodic visits for treatment by a health care provider or by a nurse or phys- ician's assistant under direct supervision of a health care provider. 29 C.F.R. § 825.1 14(a)(2)(iii)(A). First, there is no evidence before the court showing that Haefling's condition required any treatment by Dr. Segal. To police the line between serious chronic conditions and less serious conditions, courts have held that an employee's own assertion of the need for care or treatment is not enough to raise a genuine issue of material fact on this

point. E.g., Gudenkauf v. Stauffer Communications. Inc., 922 F. Supp. 465. 475-76 (D. Kan. 1996); Brannon v. Oshkosh B'Gosh, Inc., 897 F. Supp. 1028. 1037 (M.D. Tenn. 1995); Sakellarion v. Judge & Dolph Ltd., 893 F. Supp. 800, 807 (N.D. Ill. 1995). The fact that Dr. Segal did not actually provide any meaningful kind of treatment when he saw Haefling is compelling evidence that periodic visits for "treatment'" were not required. Haefling has not submitted an affidavit from Dr. Segal testifying to the contrary. Second, even if Haefling's brief visits to Dr. Segal to check on his condition were arguably "required." they did not amount to "treatments'" within the purview of FMLA regulations. "Treatment" does not include routine physical examinations. 29 C.F.R. § 825.1 14(b). and on this record, Haefling's visits to Dr. Segal amounted to no more than that. In addition. Haefling's physical therapy sessions at the Indiana Rehabilitation Center were not conducted under the direct supervision of Dr. Segal or any other doctor and therefore do not qualify as "periodic visits for treatment by a health care provider, or by a nurse or physician's assistant under direct supervision of a health care provider." See 29 C.F.R. § 825.1 14(a)(2)(iii)(A).

Because Haefling's neck injury did not constitute a chronic serious health condition, absences that he attributes to that condition do not qualify for FMLA protection. Haefling cannot establish a prima facie violation of the FMLA, so UPS is entitled to summary judgment.

C. Unable to Perform the Functions of the Position

Even if Haefling's neck injury qualified as a "chronic serious health condition." Haefling would still be unable to establish a prima facie case under the FMLA because he has

not raised a genuine issue of material fact on the question of his ability to perform the functions of his position as a feeder driver at UPS. Haefling alleges that he qualified for FMLA leave "'[b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 U.S.C. § 2612(a)(l)(D). "'The fundamental rationale for such a policy is that it is unfair for an employee to be terminated when he or she is struck with a serious illness and is not capable of working." S. Rep. No. 103-3, at 11, 1993 U.S.C.C.A.N. at 13. Where an employee fails to adduce evidence that her condition renders her unable to perform the functions of her position, that employee has failed to raise a genuine issue as to qualification as an eligible employee covered by the FMLA. See Hott VDO Yazaki Corp., 922 F. Supp. 1114. 1128 (W.D. Va. 1996).

Haefling states that his neck injury rendered him unable to perform the functions of a feeder driver on the days that he was absent due to his neck problem. However, apart from his own statements. Haefling offers no evidentiary support for that claim. The regulations explain: "An employee is 'unable to perform the functions of the position" where the health care provider finds that the employee is unable to work at all or is unable to perform any one of the essential functions of the employee's position ..." 29 C.F.R. § 825.115 (emphasis added). Haefling worked his normal shift on April 18-19, 1994, just hours after his automobile accident. Haefling stated that on April 19, 1994, personnel at the Methodist Hospital emergency room told him to "'take it easy." Haefling argues that he could not drive because he took prescription medication: however. Haefling reported taking Flexeril daily for years before this accident, presumably without any impact on his ability to perform at work. Haefling testified at his deposition that he took Hydrocodone on eleven or twelve

occasions in 1994. (Haefling Dep. at 54) Haefling offers no medical evidence to support the claim that his condition required him to take Flexeril or Hydrocodone such that they affected him while on the job. Haefling also offers no evidence apart from his own testimony to support the allegation that either medication would render him unable to perform the functions of his position.

Because the FMLA and its regulations do not permit an employee to determine on his own that a chronic condition renders him "unable to perform the functions" of his position, Haefling's deposition testimony and affidavit are insufficient evidence to raise a genuine issue of material fact on the issue of whether his neck injury rendered him unable to perform the functions of a feeder driver. See 29 C.F.R. § 825.115; accord, Godenkauf, 922 F. Supp. at 475-76 (rejecting FMLA claim because plaintiffs deposition testimony and affidavit were insufficient basis for finding that plaintiffs pregnancy kept her from performing functions of job for more than one-half day at a time); Brannon, 897 F. Supp. at 1037 (rejecting FMLA claim because plaintiffs own testimony that she was "too sick to work" was insufficient to prove that absence was necessary); Soukdarion, 893 F. Supp. at 807 (rejecting FMLA claims because plaintiffs own assertion that her adult child could not care for herself was insufficient to raise genuine issue of material fact as to whether the child was incapable of self-care). Haefling has failed to raise a genuine issue of material fact as to whether his condition made him unable to perform the functions of his position as a feeder driver. Without evidence from a health care provider finding that he was unable to perform the functions of his job, Haefling could not qualify as an eligible employee entitled to protection under the FMLA. See 29 U.S.C. § 2612(a)(1)(D); 29 C.F.R. § 825.1 15. Because the undisputed facts show either

that Haefling did not suffer from a "serious health condition" within the meaning of the FMLA or that his condition did not render him "unable to perform the functions of his position," UPS is entitled to summary judgment. Because Haefling has not shown that any of his absences qualified as leave under the FMLA, the court need not reach the issues of UPS's intent the consistency with which it applies its attendance policy, or the precise number of and reasons for Haefling's many absences.

Motion to Strike

On October 2, 1998, UPS filed a "Report of Administrative Action" with the court. This document lists various administrative proceedings in which Haefling has participated. On October 8, 1998, Haefling filed a Motion to Strike the "Report of Administrative Action," arguing that it is irrelevant and prejudicial. The court agrees with Haefling's assessment of the report and therefore grants the motion to strike.

Conclusion

The undisputed facts before the court show that plaintiff Haefling's absences did not qualify for protection under the FMLA. His neck injury does not constitute a "serious medical condition" or a "chronic serious health condition,'" and Haefling has not come forward with evidence to show that his condition rendered him unable to perform the functions of his position. Because Haefling has failed to raise a genuine issue of material fact as to his entitlement to FMLA protection, he cannot establish a prima facie case of discrimination

prohibited by the FMLA. Therefore. UPS is entitled to summary judgment, UPS's motion for leave to amend answer is denied. Haefling's motion to strike the "Report of Administrative Action" is granted, Judgment will be entered accordingly.

So ordered.
Date: December 31, 1996

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Footnotes

fn1Haefling sustained a neck injury in a 1989 automobile accident. After the 1989 accident, Haefling began taking Flexeril, a prescription muscle relaxant, daily at bedtime.

fn2The grievance Haefling filed on September 27, 1994, indicated absences on April 19, 20, and 21, 1994, for "medical reasons." Haefling's deposition testimony confirmed absences on April 19 and 20, 1994, due to his neck injury. UPS records indicate that Haefling was absent on April 19 and 20, 1994.

fn3"Grievance" refers to grievance number LU135 18656 submitted by Mr. Haefling on September 27, 1994.

fn4 deposition testimony, Haefling stated he "believes" UPS records indicating that he was absent on February 18, and he

had no reason to believe that he was at work that day, but he needed to consult his diary to be sure. However, Haefling filed with the court portions of his diary dating back only as far as April 19, 1994.

fn5The grievance also indicates a "medical" absence on April 21, 1994, that is not noted on UPS attendance records. Therefore the court has not included that absence in this list.

fn6Haefling kept a personal diary reflecting his absences from work. UPS disputes the admissibility of this diary, but Haefling's affidavit adopts, under oath, the accuracy of the diary. Its contents may therefore be considered under Rule 56, even though it may not be entirely accurate.

fn7The grievance also indicates absences on June 22 and 23, 1994, that are not noted on UPS attendance records.

fn8Haefling's grievance reflects a "medical" absence on September 2, 1994, however, his opposition brief disputes that absence. (Pl. Opposition Brief at 16) Therefore, the court has not included that absence in this list.

fn9Haefling testified that he was suspended on October 26, 1994, but he indicated that he did not know whether he worked that day or not.

fn10This list does not include vacation days or days missed due to Department of Transportation hour restrictions. UPS attendance records indicate that Haefling took approximately six weeks of vacation in 1994. Haefling testified that he missed work on November 18 and December 5, 1994, due to Department of Transportation regulations.

n11UPS alleges that Haefling was absent thirty-three times from January 1994 to February 1995. (Def. Opening Brief at 9) Viewing the facts in the light reasonably most favorable to Hae fling, the court has included only those absences admitted by Haefling.

fn12The FMLA requires only unpaid leave for eligible employees in particular situations. Haefling has not alleged that he took unpaid leave at any time.

fn13Other courts have applied 29 C.F.R. § 825.114 to determine whether an employee suffered a serious health condition. See Bauer v. Dayton- Walther Corp., 910 F. Supp. 306. 308-10 (ED. Ky. 1996) (no "serious health condition" where employee visited doctor once because of rectal bleeding, doctor conducted an examination and scheduled a sigmoidoscopy which the employee did not attend); Seidie v. Provident Mut. Life Ins. Co., 871 F. Supp. 238. 242-44 (E.D. Pa. 1994) (employee's child's ear infection was not "serious health condition" where child visited doctor once, followed a course of prescribed antibiotics, took extra fluids, stayed in bed. and stayed home from daycare for three days; legislative history of FMLA showed intent to exempt those "minor illnesses which last only a few days and surgical procedures which typically do not require hospitalization and require only a brief recovery period").

fn14Haefling's complaint alleges that he began taking Hydrocodone on May 27. 1994. When asked about the discrepancy at his deposition. Haefling could not confirm when he began to take Hydrocodone. (Haefling Dep. at 42)

fn15Before the April 18, 1994, accident. Haefling had been taking one tablet of Flexeril per day at bedtime At Methodist

Hospital on April 19, 1994, Haefling was instructed to continue taking Flexeril at bedtime and to take additional tablets as needed.

No. 97-1658

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Jack M. Haefling,
Plaintiff-Appellant,

v.

United Parcel Service, Inc.,
Defendant-Appellee.

March 4, 1999, Decided

JUDGES: Before Flaum, Easterbrook, and Kanne, Circuit Judges.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA INDIANAPOLIS DIVISION; 95 C 341, DAVID F. HAMILTON, JUDGE

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered this date.

No. 97-1658

UNITED STATES COURT OF APPEALS
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JUDGMENT

This matter comes before the court on United Parcel Service's Motion to Strike. It is hereby ORDERED that the Motion to Strike is GRANTED.

SO ORDERED

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

Filed: 12/31/96

JACK M. HAEFLING
Plaintiff

v.

UNITED PARCEL SERVICE
Defendant

Cause No. IP 95-03410C H/G

FINAL JUDGMENT

The court having this day granted defendant United Parcel Service's motion for summary judgment by reason of plaintiff Jack M. Haefling having failed to raise a genuine issue of material fact as to his entitlement to protection under the Family and Medical Leave Act of 1993, it is hereby

ORDERED, ADJUDGED, AND DECREED that plaintiff Jack M. Haefling take nothing by his complaint against defendant United Parcel Service, and that this action be DISMISSED WITH PREJUDICE.

Date: December 31, 1996

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

United States Code

TITLE 28 - JUDICIARY AND JUDICIAL PROCEDURE

PART IV - JURISDICTION AND VENUE

CHAPTER 81 - SUPREME COURT

Sec. 1254 Courts of Appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

CHAPTER 83 - COURTS OF APPEALS

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

CHAPTER 85 - DISTRICT COURTS; JURISDICTION

Sec. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

TITLE 29 - LABOR
CHAPTER 28 - FAMILY AND MEDICAL LEAVE

Sec. 2601. Findings and purposes

(b) Purposes

It is the purpose of this Act -

(1) to balance the demands of the workplace with the needs of families, to promote the stability and economic security of families, and to promote national interests in preserving family integrity;

(2) to entitle employees to take reasonable leave for medical reasons, for the birth or adoption of a child, and for the care of a child, spouse, or parent who has aserious health condition;

(3) to accomplish the purposes described in paragraphs (1) and (2) in a manner that accommodates the legitimate interests of employers;

SUBCHAPTER I - GENERAL REQUIREMENTS FOR LEAVE

Sec. 2612. Leave requirement

(a) In general

(1) Entitlement to leave

Subject to section 2613 of this title, an eligible employee

shall be entitled to a total of 12 workweeks of leave during any 12-month period for one or more of the following:
(D) Because of a serious health condition that makes the employee unable to perform the functions of the position of such employee.

(e) Foreseeable leave

(2) Duties of employee

In any case in which the necessity for leave undersubparagraph (C) or (D) of subsection (a)(1) of this section is foreseeable based on planned medical treatment, the employee -

(B) shall provide the employer with not less than 30 days' notice, before the date the leave is to begin, of the employee's intention to take leave under such subparagraph, except that if the date of the treatment requires leave to begin in less than 30 days, the employee shall provide such notice as is practicable.

Sec. 2613. Certification

(a) In general

An employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

(c) Second opinion

(1) In general

In any case in which the employer has reason to doubt the validity of the certification provided under subsection (a) of

this section for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title, the employer may require, at the expense of the employer, that the eligible employee obtain the opinion of a second health care provider designated or approved by the employer concerning any information certified under subsection (b) of this section for such leave.

(2) Limitation

A health care provider designated or approved under paragraph (1) shall not be employed on a regular basis by the employer.

(d) Resolution of conflicting opinions

(1) In general

In any case in which the second opinion described in subsection (c) of this section differs from the opinion in the original certification provided under subsection (a) of this section, the employer may require, at the expense of the employer, that the employee obtain the opinion of a third health care provider designated or approved jointly by the employer and the employee concerning the information certified under subsection (b) of this section.

(2) Finality

The opinion of the third health care provider concerning the information certified under subsection (b) of this section shall be considered to be final and shall be binding on the employer and the employee.

(e) Subsequent recertification

The employer may require that the eligible employee obtain subsequent recertifications on a reasonable basis.

[CITE: 29CFR825.101][Page 775-776] TITLE 29--LABOR CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR PART 825--THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents Subpart A--What is the Family and Medical Leave Act, and to Whom Does It Apply? Sec. 825.101 What is the purpose of the Act?

(b) The enactment of FMLA was predicated on two fundamental concerns--the needs of the American workforce, and the development of high-performance organizations. Increasingly, America's children and elderly are dependent upon family members who must spend long hours at work. When a family emergency arises, requiring workers to attend to seriously-ill children or parents, or to newly-born or adopted infants, or even to their own serious illness, workers need reassurance that they will not be asked to choose between continuing their employment, and meeting their personal and family obligations or tending to vital needs at home.

[CITE: 29CFR825.208][Page 794-796] TITLE 29--LABOR CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR PART 825--THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents Subpart B--What Leave Is an Employee Entitled to Take Under the Family and Medical Leave Act? Sec. 825.208 Under what circumstances may an employer designate leave, paid or unpaid, as FMLA leave and, as a result, count it against the employee's total FMLA leave entitlement?

(a) In all circumstances, it is the employer's responsibility to designate leave, paid or unpaid, as FMLA-qualifying, and to

give notice of the designation to the employee as provided in this section. In the case of intermittent leave or leave on a reduced schedule, only one such notice is required unless the circumstances regarding the leave have changed. The employer's designation decision must be based only on information received from the employee or the employee's spokesperson (e.g., if the employee is incapacitated, the employee's spouse, adult child, parent, doctor, etc., may provide notice to the employer of the need to take FMLA leave). In any circumstance where the employer does not have sufficient information about the reason for an employee's use of paid leave, the employer should inquire further of the employee or the spokesperson to ascertain whether the paid leave is potentially FMLA-qualifying. (1) An employee giving notice of the need for unpaid FMLA leave must explain the reasons for the needed leave so as to allow the employer to determine that the leave qualifies under the Act. If the employee fails to explain the reasons, leave may be denied. In many cases, in explaining the reasons for a request to use paid leave, especially when the need for the leave was unexpected or unforeseen, an employee will provide sufficient information for the employer to designate the paid leave as FMLA leave. An employee using accrued paid leave, especially vacation or personal leave, may in some cases not spontaneously explain the reasons or their plans for using their accrued leave. (2) As noted in Sec. 825.302(c), an employee giving notice of the need for unpaid FMLA leave does not need to expressly assert rights under the Act or[[Page 795]]even mention the FMLA to meet his or her obligation to provide notice, though the employee would need to state a qualifying reason for the needed leave. An employee requesting or notifying the employer of an intent to use accrued paid leave, even if for a purpose covered by FMLA, would not need to assert such right either. However, if an employee

requesting to use paid leave for an FMLA-qualifying purpose does not explain the reason for the leave--consistent with the employer's established policy or practice--and the employer denies the employee's request, the employee will need to provide sufficient information to establish an FMLA-qualifying reason for the needed leave so that the employer is aware of the employee's entitlement (i.e., that the leave may not be denied) and, then, may designate that the paid leave be appropriately counted against (substituted for) the employee's 12-week entitlement. Similarly, an employee using accrued paid vacation leave who seeks an extension of unpaid leave for an FMLA-qualifying purpose will need to state the reason. If this is due to an event which occurred during the period of paid leave, the employer may count the leave used after the FMLA-qualifying event against the employee's 12-week entitlement.

[CITE: 29CFR825.301][Page 806-808] TITLE 29--LABOR CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR PART 825--THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents Subpart C--How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee? Sec. 825.301 What other notices to employees are required of employers under the FMLA?

(f) If an employer fails to provide notice in accordance with the provisions of this section, the employer may not take action against an employee for failure to comply with any provision required to be set forth in the notice.

[CITE: 29CFR825.302][Page 808-809] TITLE 29--LABOR CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR PART 825--THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents Subpart C--How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee? Sec. 825.302 What notice does an employee have to give an employer when the need for FMLA leave is foreseeable?

(c) An employee shall provide at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed for an expected birth or adoption, for example. The employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave (see Sec. 825.305).

[CITE: 29CFR825.303][Page 809] TITLE 29--LABOR CHAPTER V--WAGE AND HOUR DIVISION, DEPARTMENT OF LABOR PART 825--THE FAMILY AND MEDICAL LEAVE ACT OF 1993--Table of Contents Subpart C--How do Employees Learn of Their FMLA Rights and Obligations, and What Can an Employer Require of an Employee? Sec. 825.303 What are the requirements for an employee to furnish notice to an employer where the need for

FMLA leave is not foreseeable? (a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved. (b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile (``fax") machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation.

Wayne Johnson, Plaintiff, - against - Primerica, a/k/a The Travelers Inc., d/b/a Smith Barney Shearson, a/k/a Smith Barney, Defendant.

94 Civ. 4869 (MBM) (RLE)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

January 29, 1996, Decided
January 30, 1996, FILED

COUNSEL: [*1] Gareth W. Stewart, Attorney for Plaintiff Johnson, New York, N.Y.

Smith Barney Inc., Office of the General Counsel, Attorneys for Defendant, New York, N.Y.

JUDGES: The Honorable Ronald L. Ellis, United States Magistrate Judge

OPINIONBY: Ronald L. Ellis

OPINION: MEMORANDUM OPINION and ORDER

RONALD L. ELLIS, United States Magistrate Judge:

I. INTRODUCTION

This action was referred to the undersigned for all proceedings, including trial under 28 U.S.C. § 636(c), by

order of the Honorable Michael B. Mukasey on August 8, 1994. Plaintiff Wayne Johnson ("Johnson") brought this action against his former employer, Smith Barney, pursuant to the Family and Medical Leave Act, 29 U.S.C. §§ 2601 et seq. ("FMLA" or "Act") and the Consolidated Omnibus Budget Reconciliation Act, 29 U.S.C. §§ 1161 et seq. ("COBRA"). Johnson alleged that his termination for absences from work violated his rights under the FMLA because the absences were qualified leave under the Act. He also alleged that Smith Barney had: (1) wrongfully seized and appropriated his money in a 401(k) pension plan; (2) forfeited his stock options; (3) refused to pay him his bonus; (4) failed to pay him severance [*2] according to the severance pay plan; and (5) refused to extend his medical coverage post-termination. Prior to trial, Johnson apprised the court that he no longer maintained claims 1-4. Joint Pre-trial Order at 1. In addition, he presented no evidence on claim 5 at trial. The only issue litigated at trial was the alleged illegal termination. Johnson seeks declaratory and injunctive relief and compensatory and punitive n1 damages. A one day non-jury trial was held on October 19, 1995. For the reasons discussed below, I find that plaintiff failed to invoke the FMLA's statutory protections when he notified his employer of his need for leave.

II. FACTS

Johnson, who holds a bachelor's degree in business administration, began working at Smith Barney as a computer programmer in the Retail [*3] Trading Systems Department on September 17, 1988. At the time of his termination on November 15, 1993, Johnson had obtained the position of group leader for the principal inventory control system in

which he supervised four employees. Tr. at 4. n2 Johnson was supervised by Gary Schoell ("Schoell") vice president, who was subordinate to Mark McCarthy ("McCarthy"), senior vice president.

The series of events which led to Johnson's termination began on October 28, 1993. Johnson did not report to work on three consecutive business days - Thursday, October 28, Friday, October 29 and Monday, November 1 - and failed to call the office to give any reason for his absence. Tr. at 45. Following this period of absence, Schoell met with Johnson to request an explanation for the absence and to issue a reprimand and warning. Tr. at 47-48. Johnson indicated that he had not reported to work because he was handling personal matters and indicated [*4] his need for a leave of absence to take care of some family matters specifically "to help his family start up a family business." Tr. At 48. Johnson was instructed to reduce his request to writing and he submitted a memorandum on November 3, 1993. Tr. at 49. In the memorandum, Johnson stated that he was requesting the "month of November off without pay [because he was] forced by circumstances to [attend to] a matter . . . of significant financial importance to [his] immediate and extended family." Pl. Ex. 1; n3 T. at 19. Johnson neither reported or called in to work on November 4, 1993. McCarthy thereupon directed Schoell to issue a written warning to Johnson regarding his unexcused absences. Tr. at 51. A written warning was prepared and left on Johnson's chair on November 4, 1996. Tr. at 51; Def. Ex. C. n4 Upon Johnson's return to work on November 5, 1993, Schoell informed him that his leave request had been denied because Smith Barney was undergoing merger with another company at that time and his services were required. Tr. at 52-53.

Johnson testified that he did not recall receiving the written warning (Def. Ex. C), Tr. at 29, and alleged that after being informed that his leave request was denied, he asked Schoell if he could be allowed "a couple of days off . . . to straighten out some things" and Schoell advised Johnson to "keep him posted." Tr. at 7. There was no discussion of illness.

According to McCarthy, Johnson contacted him in his office on November 5, 1993, to further discuss the denial of his leave request. Tr. at 64. McCarthy reiterated to Johnson that it was not appropriate to allow him time off to handle "personal business while everybody was working overtime[,]" and that his job would be in jeopardy if he didn't call in when he was absent from work. Id. Again there was no conversation about illness.

Johnson did not report to work after November 5. Schoell contended that he received phone messages daily from Monday, November 8, through November 11, via the secretary, indicating that Johnson was absent from work due to a back [*6] problem. Tr. at 54. Johnson did not report to work or call in on November 12, 1993. Tr. at 54. McCarthy testified that Johnson was fired on November 15, 1993, as a consequence of his failing to report or phone in to work on November 12, 1993, and November 15, 1993. Tr. at 53-54, 66-67.

After receiving notice of his termination, Johnson made no immediate attempt to contact his former managers at Smith Barney. Tr. at 33. Instead, he reported to the Human Resources Department at Smith Barney "sometime in December" of 1993 to ask the location to which his former department had been moved. Tr. at 15-16, 32. At that time, Johnson was aware that he had been terminated, but believed

that he could show "reasonable grounds . . . [that he] needed . . . and [ ] wanted [his] job back." Tr. at 36-37.

Johnson argued that he was unjustly terminated because 1) his absences were qualifiable and excusable under the FMLA as he was needed at home to care for his ill child and, moreover, his leave request should have been granted despite the poorly drafted memorandum because his supervisors were aware of his three year old son's illness (Tr. at 23), and 2) he did not abandon his job as he left daily [*7] phone messages with the secretary indicating that he was unable to report to work because his son was ill. Tr. at 34-35.

Smith Barney, on the other hand, maintained that Johnson failed to mention any family or medical reasons and only indicated that "financial" considerations motivated his request for leave. Def. Tr. Mem. Of Law at 2. n5 Further, Smith Barney asserted that Johnson's request for leave was properly denied on the basis of legitimate business reasons. According to Smith Barney, Johnson was justly terminated because he 1) had exceeded his personal, vacation and sick leave allotment and 2) had on several occasions violated Smith Barney policy by failing to report to work and by failing to notify his supervisors that he was not able to report to work after being warned that unexcused absences are "grounds for immediate dismissal." Def. Ex. C and Tr. at 52; Tr. at 42-48.

III. DISCUSSION

A. FAMILY AND [*8] MEDICAL LEAVE ACT

Congress enacted the Family and Medical Leave Act (FMLA) on February 3, 1993, in response to major demographic changes that have impaired the ability of families to meet the

care-taking needs of young children, ill family members and elderly parents. Myriad factors contribute to this major social problem, including: 1) the increasing number of women entering the workplace; 2) the increasing number of single-parent families -- many of which are headed by women in low wage employment; and 3) the increasing number of elderly adults who depend either directly or indirectly on wage-earning offspring for care. The FMLA was designed to provide a security net for families by setting a minimum employment standard for unpaid leave that is required on the basis of medical necessity while balancing the legitimate needs of employers. 29 U.S.C. § 2601(b). See also S. Rep. No. 3, 103rd Cong., 1st Sess. 3-5 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 5-7.

The FMLA covers all private employers with 50 or more workers that are employed daily for at least 20 weeks in a calendar year and who work within 75 miles of the worksite. Eligible employees must have been employed for a minimum [*9] of 12 months and have worked a minimum of 1250 hours during that 12-month period. 29 U.S.C. § 2611(2)(A) & (B). Qualified employees are entitled to up to twelve weeks of unpaid leave per year for reasons having to do with 1) the birth or care of a newborn; 2) the care of a child newly placed in the employee's home via foster placement or adoption; 3) the care of a seriously ill spouse, son, daughter or parent; and 4) the employee's own serious health condition which renders him or her incapable of meeting the requirements of the job. 29 U.S.C. § 2612. At the end of the qualified leave period, an employee is entitled to be reinstated to his or her former position -- or its equivalent -- and to be restored to full employment rights and benefits. 29 U.S.C. § 2614. See Gregory W. Guevara, The Family and Medical Leave Act of 1993: An Overview of the Law and Regulations, 37 Res

Gestae 214 (1993).

There is no dispute that Smith Barney is a covered employer and that plaintiff is an eligible employee under the FMLA. The controversy centers on the invocation of employee protections and the employer's obligations under the FMLA. Plaintiff relies on the interim Final Regulations ("regulations"), [*10] promulgated under the FMLA and issued by the United States Department of Labor, that were in effect at the time of his termination in November 1993. See 58 Fed. Reg. 31794 (1993) (to be codified at 29 C.F.R. § 825) (proposed Jun. 4, 1993); n6 and Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995).

1. The Definition of "Serious Illness" under the FMLA.

In determining whether an employee's leave request qualifies for FMLA protection, the employer must assess whether or not the request is indeed based on a "serious health condition," and may request medical documentation to support the leave request. 29 C.F.R. § 825.302(c). See also Gregory W. Guevara, The Family and Medical Leave Act of 1993: An Overview [*11] of the Law and Regulations, Part II, 37 Res Gestae 256 (1993). The FMLA defines "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves[:] (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." 29 U.S.C. § 2611(11). The regulations provide that a serious physical or mental condition involves:

(1) Any period of incapacity or treatment in connection with or consequent to inpatient care . . . in a hospital, hospice, or residential medical care facility;

(2) Any period of incapacity requiring absence from work, school, or other regular daily activities, of more than three calendar days, that also involves continuing treatment by (or under the supervision of) a health care provider; or

(3) Continuing treatment by (or under the supervision of) a health care provider for a chronic or long-term health condition that is incurable or so serious that, if not treated, would likely result in a period of incapacity of more than three calendar days; or for prenatal care.

29 C.F.R. § 825.114(a).

Continuing treatment by a health care [*12] provider means that an employee or affected family member: 1) is attended to by a health provider at least twice; or 2) receives therapeutic services -- such as physical or speech therapy -- two or more times, or is evaluated at least once by a health provider who initiates a long-term therapeutic regimen that is to be continued under that provider's supervision; or 3) is chronically ill and under the continuing care of a health care provider, though is not receiving any medical therapy. 29 C.F.R. § 825.114(b)(1)(2) & (3).

No evidence was submitted to corroborate Johnson's claim that his son suffered from a serious illness as defined under the FMLA and the regulations promulgated thereunder. Johnson testified that his son suffers from an acute condition of asthma that is "triggered by the common cold so he gets a cold, he gets asthma." Tr. at 9. He also testified that his leave request was not triggered by any directive from a physician indicating that his child needed special care, but rather, resulted from Johnson's desire "to monitor [his] son and to be with him if he needed to go to the doctor, to take him, and

monitor his daily activities. Tr. at 11. Upon further direct questioning, [*13] Johnson testified that his son was being treated with asthma medication that required timely administration. Tr. at 12. He testified further that he could no longer depend on his mother's assistance in caring for his son due to the terminal illness and subsequent death of his maternal grandmother. Tr. at 10-11.

Testimony was given that Johnson's son had been hospitalized on several occasions in the past. Tr. at 9. However, there was no evidence presented that at the time period in question, Johnson's son was acutely ill, undergoing complex therapy, or that he was so incapacitated that he was required by doctor's order to remain home from nursery school. Although there was testimony that Johnson's son has been acutely ill from time to time, there is no indication that his son suffers from a chronic or long-term illness. There is evidence to the contrary. Tr. at 7. In order to find support for Johnson's claim that his leave was proper under the FMLA, the court must find that Johnson's child suffered a "serious health condition" as defined by the FMLA and its implementing regulations, and, without further evidence, the court is unable to find that the child's health condition invokes [*14] FMLA protections. See Sakellarion at 801. Even if the court were to find that a serious health condition existed, Johnson has failed to show that his words or actions gave Smith Barney notice of such illness.

2. Notice Requirements Under the FMLA.

In instances in which the need for leave is foreseeable (for example, the birth of a child or the need to be hospitalized for an elective procedure), an employee must provide his or her employer with no less than 30 days advance notice, or if leave

must begin sooner, 'the employee shall provide such notice as is practicable." 29 U.S.C. § 2612(e)(1) & (2)(B); see also 29 C.F.R. § 825.302. The statute is silent on employee obligations when the need for leave is not foreseeable. However, the legislative history indicates that an employee's need to take qualifying leave will not be precluded by an inability to give notice to the employer in advance. See S. Rep. No. 3, 103rd Cong., 1st Sess. 25 (1993), reprinted in 1993 U.S.C.C.A.N. 3, 27, and H.R. Rep. No. 8, 103rd Cong., 1st Sess., pt. 1, at 38 (1993). Additionally, the interim regulations provide that "an employee should give notice . . . as soon as practicable under [*15] the facts and circumstances of the particular case. 29 C.F.R. § 825.303(a). Although the form and content of the notice is not specifically defined by law, the interim regulations state that an employee should give

at least verbal notice sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed . . . .

29 C.F.R. § 825.302(c). After the employee gives sufficient notice to the employer about the need for personal or family-related medical leave, the employer is then obligated to query the employee in order to determine whether or not the leave is justifiable under the FMLA. Id. Also, the FMLA and regulations permit and encourage the employer to request "certification" issued by a medical or health care provider to substantiate the employee's need for leave. 29 U.S.C. § 2613 and 29 C.F.R. § 825.305.

3. Johnson's Notice to Smith Barney.

Johnson asserts that Smith Barney knew 1) his son was ill; 2) his absence was due to his son's illness; and 3) [*16] his absences were excused under the FMLA. This position was inadequately supported at trial. Johnson testified that at the time he requested leave he "intimated" to Schoell that his son was ill, but was unable to "recall exactly what [he] said that would have triggered [his son's illness] in [Schoell's] mind." Tr. at 36. Schoell directly contradicted this assertion and testified that Johnson informed him that he needed the time off to start up a business. Even if the court were to find that Johnson had "intimated" to Schoell that his request was premised on his son's illness, the FMLA provisions would not be triggered unless Johnson could show that Schoell understood his oblique references. While an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant. Johnson simply has not carried his burden of showing that the employer was put on notice of a possible FMLA leave situation. The court finds that the only reason conveyed to Smith Barney was contained in the written request which indicates that the leave was based on "a matter of significant financial importance to . . . [Johnson's] family." Tr. at 19. [*17]

Johnson argues that his "inelegantly drafted" memorandum should be discounted in view of the fact that it was generally known that his son suffered from asthma. Tr. at 35. He argues further that, in view of Smith Barney's prior knowledge of his son's illness, his supervisors were obligated to inquire as to whether his leave request was qualified under the FMLA. In support of this argument, Johnson points to the following: 1) Schoell's testimony that he was informed by Johnson "after

he had returned to work from one of his [unexcused] absences [in October 1993 that Johnson's] son was sick and that was the reason he was out," Tr. at 55-56; 2) a former supervisor was particularly sympathetic to his son's plight because he also suffered with asthma, Tr. at 22-23; and 3) approximately one year prior to the period in question his former supervisor granted him a two-week leave without pay for what he "think[s] [were reasons related to his] son's illness." Tr. at 20.

Nothing in the FMLA, or the governing regulations, however, suggests that an employer's duty to inquire may be triggered solely by the employer's knowledge of prior medical events. Johnson's reliance on Brannon v. [*18] Oshkosh B'Gosh, Inc., 897 F. Supp. 1028 (D.Tenn 1995), is misplaced. Pl. Post Tr. Br. at 11. While Brannon acknowledges the employer's obligation under the FMLA to make subsequent inquiries when an employee gives notice of leave needed to care for an ill child, Johnson overlooks the fact that the employer's duty to conduct further inquiry into a leave request is first triggered when an employee gives sufficient notice of a medical need for the requested leave. Id. at 1038. See also 29 C.F.R. § 825.302(c). In contrast to Johnson's "intimations," the plaintiff in Brannon: 1) informed her employer in advance that her three year old daughter was ill and that she might have to miss work if her daughter's condition did not improve; 2) notified her supervisor by phone each workday that she was at home caring for her ill daughter; and 3) submitted a medical note to her employer requesting that her absences from work be excused on the basis of her daughter's illness. 897 F. Supp. at 1032. Thus, the court in Brannon found that the employer was sufficiently aware that plaintiff's absence may have been qualified under the FMLA and was thus obligated to inquire as to whether [*19] her absences

were indeed excusable. Id.

Similarly, in Manuel v. Westlake Polymers Corp., supra, the employer was aware that the plaintiff was absent for medical reasons. The lower court had held that, because the complication suffered by the employee as a result of a surgical procedure on her ingrown toenail was not so obviously a "serious injury, such as a broken leg, cancer or heart attack, which would trigger an employer inquiry into whether the employee intended to use FMLA leave," the employee was obligated to specifically invoke the FMLA by name. 66 F.3d at 761 (citation omitted) (quoting lower court). The Fifth Circuit reversed, holding that an employee must merely provide sufficient information to put the employer on notice that the leave is qualified under the FMLA and need not expressly mention the Act. (Id. at 764.

Johnson cannot favorably compare his situation with that of the plaintiffs in Brannon or Manuel because his written request for leave belies his claim that his need for leave was qualified under the FMLA. Moreover, he cannot shield himself behind inexperience or naivete to excuse the alleged drafting error for his case differs from that [*20] of an inarticulate individual who is disinclined to reveal personal matters such as family illness. By his own testimony, he acknowledges that many persons at Smith Barney had been informed and were knowledgeable about his son's condition and that a prior unpaid leave request may have been granted on the basis of his son's being ill at that time. Tr. at 20. Thus, it is not credible that Johnson would fail to articulate a real medical reason when drafting a leave request that was allegedly based on medical exigency. While Johnson was not obligated to specifically invoke rights under the FMLA, he should have given sufficient notice so as to put Smith Barney

on notice that his leave request may have been qualified under the FMLA.

Arguably, Smith Barney would have been obligated to inquire further as to whether his absence was excusable under the FMLA if Johnson had called in daily to report that his son was ill. The court in Brannon noted that even if plaintiff had not forewarned her employer about her daughter's illness, because the need for leave was unforeseeable, her absences were excusable because she gave notice "as soon as practicable [when she called in and upon returning [*21] to work]." 897 F. Supp. at 1037 (citing 29 C.F.R. § 825.208(a) (1995)): see also 29 C.F.R. § 825.303. The court however, finds credible the testimony of defendant's witnesses that Smith Barney was not informed of any alleged illness of plaintiff's son. This finding is bolstered by the fact that Johnson failed to mention his son's illness in the leave request. Johnson claims that his formal request inadvertently omits the real reason for his absences; yet asserts that he called each day to confirm the illness. The court does not find this testimony credible. Moreover, although Johnson testified that he called in daily to report that his son was ill, he did not allege at trial that his son's illness was unforeseen. n7 Indeed, at trial he attempted to suggest that he wanted to be at home in anticipation of possible complications in his son's condition. Tr. at 11.

Relying on 29 C.F.R. § 825.208(e)(1) (1995), n8 Johnson also argues that employees who are absent without leave are still eligible for FMLA protection if they provide sufficient justification for absence within two days of returning to work. Pl. Post-Tr. Br. at 10-11. Even if the current regulation were applicable, n9 Johnson would be unable to invoke its protection as he made no attempt to contact his supervisor or

anyone else at Smith Barney in the period immediately following the receipt of notice of his termination. Tr. at 32-33.

Although Johnson disputes Schoell's testimony that he left phone messages during the period in question in which he indicated that he himself was ill due to a back ailment (Tr. at 54-55), he argues that if the situation was as Schoell believed, then Smith Barney failed to make further inquiry in order to determine whether his back problem was covered under the FMLA. Pl. Reply Post-Tr. Br. at 13. n10 This argument is inconsistent with Johnson's claim that the reason for his absence was his son's illness. Moreover, Johnson's failure to return to work immediately after his absence renders the question moot.

4. Employer's Obligation to Post Information about the FMLA

Covered employers must post notices in conspicuous locations at the worksite which describes the purposes and requirements of the FMLA. 29 C.F.R. § 825.300(a). Additionally, "an employer that fails to post the required notice cannot take any adverse action against an employee, including denying FMLA, for failing to furnish the employer with advance notice of a need to take FMLA leave." 29 C.F.R. § 825.300(b).

Johnson argues that Smith Barney did not offer evidence that it had posted notices about the FMLA at the worksite as required under the Act and therefore judgment should be entered against Smith Barney on this basis alone. Pl. Reply Post-Tr. Br. at 7. Johnson relies on Hendry v. GTE North, Inc., 896 F. Supp. 816 (N.D.Ind. 1995). In Hendry, plaintiff

suffered severe migraine headaches and asked to have her sick time charged against her remaining vacation days. Her request was denied and she was subsequently terminated for excessive absences due to illness. Id. at 828. The court found that her employer failed to 1) further inquire as to whether plaintiff's illness qualified her for unpaid leave under [*25] the FMLA, and 2) to post notices about the FMLA. Id. Johnson's situation is different because he failed to inform Smith Barney of any covered illness. Smith Barney's failure to post might excuse Johnson of any requirement of advance notice of the need for leave but it does not mean that Smith Barney is liable for Johnson's failure to identify a medical reason.

IV. CONCLUSION

For the reasons set forth above, Mr. Johnson was not eligible for leave under the FMLA as he failed to demonstrate that his leave request was qualified under the FMLA.

IT IS THEREFORE ORDERED that judgment be entered for defendant.

SO ORDERED this 29th day of January 1996.

New York, New York

The Honorable Ronald L. Ellis

United States Magistrate Judge

----------Footnotes----------

n1 Although punitive damages are not available under the FMLA, an employee may recover statutory liquidated damages, equal to twice the actual damages and interest recoverable by the employee. 29 U.S.C.A. § 2617(a)(1)(A)(iii).

n2 References to Tr. at " are to the Trial Transcript of October 19, 1995.

n3 "Pl. Ex. " refers to Plaintiff's Exhibits admitted at trial. [*5]

n4 "Def. Ex. " refers to Defendant's Exhibits admitted at trial.

n5 "Def. Tr. Mem. of Law at " refers to Defendant's Trial Memorandum of Law.

n6 The Secretary published final regulations effective February 6, 1995 (see 60 Fed. Reg. 2181 (Jan. 6, 1995)); however, the interim regulations govern this action. See also Robbins v. Bureau of Nat. Affairs, Inc., 896 F. Supp. 18, 21 (D.D.C. 1995).

n7 Because Johnson provided no additional evidence to support his assertion that his son was ill during the period of his absence, the court need not reach the question of foreseeability. See Sakellarion v. Judge & Dolph, Ltd., 893 F. Supp. 800 (N.D.Ill. 1995) (plaintiff not entitled to invoke FMLA protection by mere assertions alone - with nothing more - that daughter was ill and that illness was qualified under the FMLA).

n8 29 C.F.R. 825(e)(1) (1995) states
(1) If the employee was absent for an FMLA reason and the employer did not learn the reason for the absence until the employee's return (e.g., where the employee was absent for only a brief period), the employer may, upon the employee's return to work, promptly (within two business days of the employee's return to work) designate the leave retroactively with appropriate notice to the employee. If leave is taken for an FMLA reason and has not been so designated by the employer, but the employee desires that the leave be counted as FMLA leave, the employee must notify the employer within two business days of returning to work that the leave was for an FMLA reason. In the absence of such timely notification by the employee, the employee may not subsequently assert FMLA protections for the absence. [*23]

n9 See 60 Fed. Reg., 2180 (1995). These Regulations cannot be retroactively applied to the instant case. SeeBowen v. Georgetown University Hospital, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988) ("congressional enactments and administrative rules will not be construed to have retroactive effect unless their language requires this result."); see also FN 6.

n10 "Pl. Reply Post-Tr. Br. " refers to Plaintiff's Reply Post-Trial Brief.

Q What time of day?

A Whatever fit my schedule. Usually right after lunch, early afternoon.

Q How long would each program or each visit take?

A Approximately an hour.

Q You didn't go two or three times a week every week between in or near May of 1994 and February or March of 1995, did you?

A No.

Q You would go less than once a week then, right? Maybe more accurately once every two weeks?

A There was .. do you want me to explain this?

Q Please do.

Mr. Rogers: Yes

THE WITNESS: It would go like in batteries. As there were more frequent spasms and my neck would lock up, I would go more often. As they subsided, it was more of a maintanence thing to see how long the spasms would last. The spasms would start up again. The physical therapy would become more intense, and then it would subside.

Q And you haven't been back to receive any physical

therapy in connection with this particular problem since February or March of 1995?

A Correct.

Q How many times did you see Dr. Steven Segal with respect to this particular injury?

A Probably I would say 10 times.

Q Over what period of time?

A Probably that nine or ten-month period from the accident.

Q Who referred you to Dr. Segal?

A I believe it was Mr. Kahn's office.

Q Somehow I'm not surprised, Mr. Haefling. This is part of your lawsuit against Hunt Paving, right?

A Yeah. That is, yeah.

Q You're sure Dr. Segal is a medical doctor and he's not a chiropractor, right?

A No. He's a medical doctor.

Q And you haven't been back to see Dr. Segal since February or March 1995 either?

A Yeah. You just asked that question.

Q No. I was talking about the physical therapist before.

A Correct. Yes. I have not seen him.

Q Your extant musculature is okay now?

A I don't have any problems with that, no. My head is still attached.

(A discussion was held off the record.)

Q This injury that you had in April of 1994 manifested itself in muscle spasms and a pain in your neck, right?

A Correct.

Q Other than the discomfort that one would normally associate with that, did it manifest-itself in any other fashion?

A Yes. I was experiencing a. sharp shooting pain down my neck, and I got about three times I had a very, very nauseous headache.

Q A nauseous headache?

A A nauseous headache.

Q There's a lot of that going around too. When I read things like extant musculature, I get nauseous.

A Seriously, that did concern me with the sharp pains.

Q That happened three times?

A Approximately three times, yes.

Q When?

A When? I was driving a UPS truck, yes.

Q When was that?

A That was over the course of that summer. I can't remember the exact dates. I had those. It startled me.

Q It would suddenly attack you?

A Yes.

Q That happened three times? How many times did you have the nauseous headache?

A It was about three times. It was connected together.

Q So the three incidents that you had were nauseous headache and a radiating pain -

A Right. That's what scared me.

Q --down one side of your neck?

A Right.

Q Which side?

A Can you rephrase that again?

Q Which side? Side which? Which side of your neck did you have the radiating pain?

A In the right side right in through here.

Q The back right of your neck?

A The pain would shoot down; and it would shoot up into this area right in through here, more on the right; and when the sharp pain hit, it was right in the left side too, right here at the base.

Q The base of your skull?

A Yes.

Q The end of your trapezes muscle, right?

A Correct; and by the external occipital protuberance.

Q Gesundheit. Yes, I knew that.

MR. ROGERS:I'm glad everybody else knows this.

Q Other than these three incidents -

MR. ROGERS:Approximately three incidents is what his testimony was.

Q Was it more than three or was it less than three?

A Oh, guys. Three that I particularly remember.

Q Okay. Three memorable incidents.

A Yes.

Q Other than those three memorable incidents, did you have any other manifestations of this injury?

A Yeah I would - what caused me to take more Flexeril on occasion was I would get a lock in my neck where I couldn't even turn it left or right. Now, that didn't bother me so much because there wasn't the pain of the other stuff that just scared me because I've never experienced that before; but I could not turn.